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Judiciary Committee  
February 15, 2007

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[LB107 LB142 LB246 LB467 LB475 LB639 LR4CA]

The Committee on Judiciary met at 1:30 p.m. on Thursday, February 15, 2007, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR4CA, LB639, LB142, LB246, LB107, LB467, and LB475. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Vickie McDonald; Amanda McGill; Dwite Pedersen; Pete Pirsch; and DiAnna Schimek. Senators absent: None. []

SENATOR ASHFORD: Good afternoon everybody. Welcome to the committee hearings today. We have seven bills today. So in order to get through the process I want to explain a couple of things about how we work. And I notice some of you are here often and understand the program, but we have the notorious light system. It doesn't shock anybody, just the lights come on. But what we have...we're going to ask you to limit your testimony to about three minutes. When the yellow light comes on that's a minute to go, and when the red light comes up it's not necessary that you stop on a dime, but we ask you to sum up your testimony. And that doesn't apply to introducers, Senator Avery. You have a minute. []

SENATOR AVERY: Three and a half minutes. (Laughter) []

SENATOR ASHFORD: And we have a sheet that we're passing so you can sign up if you plan on testifying. If there are a number of people testifying on a particular bill and you're working together on a bill, if you could combine your testimony if possible so that we don't repeat testimony, that would be helpful. Let me introduce my colleagues. Senator Schimek from Lincoln, Senator Pedersen from Elkhorn, Senator Lathrop from Omaha, and Senator McGill from Lincoln, and Senator Pirsch from Omaha is here. And I think that's about it. LR4CA, Senator Avery from Lincoln. [LR4CA]

SENATOR AVERY: Thank you, Mr. Chair and members of the committee. My name is Bill Avery, A-v-e-r-y. I represent District 28 in Lincoln. I am here to ask you to advance to the floor LR4CA, which deals with impeachment. What I'm trying to do here is clarify constitutional language that deals with the impeachment process. Current language allows for impeachment only for offenses committed while in office. I want to change that. It is my belief that offenses committed in the pursuit of public office should be treated the same as impeachment offenses committed while in office. So I propose with this legislation to put on the ballot a constitutional amendment that would achieve that purpose. A candidate for public office should not be allowed to benefit from the commission of an act that if committed while in office could have warranted impeachment. So LR4CA, I believe, is sound policy and is intended to buttress the integrity of the election process. To have a situation where an officeholder cannot be removed from office for committing an unlawful act during his or her campaign I think needs to be fixed. It's a bit disrespectful to the citizens of the state and in fact, might

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even be an affront to our political institutions. This situation, I admit, may not come up very often, but it did recently arise in the case involving Regent Hergert. Had he not signed his accountability and disclosure report after taking the oath of office, he might very well have gotten off with merely a fine. This development allowed the Legislature, because he did sign his papers after taking the oath, it allowed the Legislature and the prosecuting team to make the case that he had filed a false statement which occurred after taking office, and thus it was impeachable. If this amendment is approved by the voters the constitution would be changed. It would serve as an important deterrent to campaign misdeeds because it raises the ante to a higher level of possible consequences. I'm not asking for too much. I'm not asking for very much really. It's not asking a lot of candidates who seek office to do the right thing and to be held accountable for their actions when they don't. So let's send a message to candidates and to campaigns that it's not a win at all costs endeavor. It never should be the case that the end justifies the means. The message must be if you choose to commit an offense that can be impeachable if committed while in office then you will be held accountable for that offense after election. Now there is a bill before the Government Committee introduced by Senator Chambers, LB464. I see my bill as a companion bill to his. What his would do would be to remove criminal enforcement of the Public Accountability and Disclosure Act from the A&D Commission, and places the criminal enforcement with the Attorney General and grants concurrent jurisdiction with the county attorneys of the county in which the infraction took place. I hope we advance that from my committee and I would hope that you would advance this one. Thank you. [LR4CA]

SENATOR ASHFORD: Thanks, Senator Avery. Senator Chambers has joined us. How many in the room here have never been here before to testify? Not this room, but I mean the capitol or been to a hearing? (Laughter) So are you all testifying? Are you all here to testify? Good. Well, welcome. (Laughter) Or whether they're just spectators. I didn't know. So how many testifiers do we have on this particular measure? All right. Any questions of Senator Avery? [LR4CA]

SENATOR AVERY: This is such a transparently good bill. You probably won't have a lot of opposition to it and I will waive closing by the way. [LR4CA]

SENATOR ASHFORD: Thank you, Senator Avery. [LR4CA]

SENATOR PIRSCH: You know I can ask the next testifier the same question, so... [LR4CA]

SENATOR ASHFORD: Okay. No, go ahead, Senator Pirsch. [LR4CA]

SENATOR PIRSCH: No, it's quite okay. [LR4CA]

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SENATOR ASHFORD: I wasn't...thank you. Thanks, Senator Avery. [LR4CA]

JACK GOULD: (Exhibits 1 and 2) Senator Ashford, members of the committee, my name is Jack Gould, that's G-o-u-l-d, and I'm here representing Common Cause Nebraska. I think the key that Senator Avery just said was the fact that the ends doesn't justify the means, and we would agree with that 100 percent. The election process needs to be protected just as fiercely as the office that it leads to. And we feel that the impeachment process is a very valid tool to be used because it involves both the legislative and judicial branches. It's a slow process, but it's a thorough process. And so extending the impeachment process to the election is probably the best possible thing. We also support Senator Chambers' bill and we do believe that the two work very well together. I would also just remind you of the fact the impeachment process carries with it a very serious overtone, and it's our feeling that this is not likely to be used frivolously by people. That in the end, the impeachment process is probably the best tool. Thank you. [LR4CA]

SENATOR ASHFORD: Thank you, sir. Any questions? [LR4CA]

SENATOR PIRSCH: I'll just ask. This doesn't, if my understanding is correct, broaden the list of types of activities that would be impeachable. It just extends it by making those individuals who are only covered by the provisions after they would elected now covered while they are candidates, is that correct? [LR4CA]

JACK GOULD: That's correct. I think the Accountability and Disclosure Commission itself is extremely generous in the way they approach a lot of the violations and they understand that people running for office are often inexperienced with the process. And I think they have displayed a noble effort to both be helpful and not to be putting punishment as their primary interest. But at the same time, when an obvious violation has taken place as in the case that was mentioned by the Senator, then you know, there needs to be a way of removing these people from office. [LR4CA]

SENATOR ASHFORD: Jack. [LR4CA]

JACK GOULD: Yes, sir. [LR4CA]

SENATOR ASHFORD: Any other questions down there? All right. Jack, what is...misdemeanors does not refer to a misdemeanor statutory...that's not a statutory term or is it? [LR4CA]

JACK GOULD: I don't believe it is. [LR4CA]

SENATOR ASHFORD: It's just a...misdemeanor is a generic term. It's any offense. Is that what that means? [LR4CA]

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JACK GOULD: I believe so. I'm not a lawyer, but I think you're correct. I think, you know, a felony would be a different case. [LR4CA]

SENATOR ASHFORD: It would be different. So it's any violation of any statute related to elections of any kind? [LR4CA]

JACK GOULD: I think--and I don't know whether the language is there or not, but I think it's the intent to deceive is the real concern. [LR4CA]

SENATOR ASHFORD: Right. Right. It's not the failing to file a form... [LR4CA]

JACK GOULD: No. [LR4CA]

SENATOR ASHFORD: ...two days or you know, if you're two days late on a form. And we're not... [LR4CA]

JACK GOULD: No. [LR4CA]

SENATOR ASHFORD: Because we don't want to discourage good people from running for office either. [LR4CA]

JACK GOULD: We work very hard in trying to create the Campaign Finance Act long ago. [LR4CA]

SENATOR ASHFORD: Right. Oh, I remember that you did and I was... [LR4CA]

JACK GOULD : And it has never ceased to amaze me how people have been able to find ways of manipulating the law. And I think we spend an awful lot of time just trying to close the loopholes as we go along, and this is a case where I think... [LR4CA]

SENATOR ASHFORD: Right. I think, I mean I was a co-sponsor of that bill...I think our idea--Senator Avery, of course worked on that very hard--but I think the idea was compliance, but obviously if there are significant violations they're treated different or should be treated differently than simply compliance problems where you may miss a deadline or you may not fill out a line correctly or...and you believe there is a difference. [LR4CA]

JACK GOULD: Well, it appears that there are people that fines don't seem to mean anything. I mean, regardless of whether it's \$10,000 or \$33,000, it doesn't seem to mean anything. So there has to be another tool beyond just putting a fine on someone. [LR4CA]

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SENATOR ASHFORD: And in Senator Chambers' bill we are adding another tool, because we are--in his bill--providing that a county attorney can file independently of the accountability and disclosure and the Attorney General. So there's another avenue for prosecution apart from impeachment. Correct? [LR4CA]

JACK GOULD: We feel that both the legislative resolution and the bill are an excellent way of addressing the problem. [LR4CA]

SENATOR ASHFORD: I mean, I think it's important. This provision is important as long as it doesn't have a chilling effect on the breadth of it so that we're not... [LR4CA]

JACK GOULD: Scaring people away. [LR4CA]

SENATOR ASHFORD: ...scaring people, because we need...with term limits we're having a lot of people run all the time, you know? [LR4CA]

JACK GOULD: That's true. [LR4CA]

SENATOR ASHFORD: So we want to make sure we get good people [LR4CA]

JACK GOULD: Right. [LR4CA]

SENATOR ASHFORD: Thanks for your comments, Jack. [LR4CA]

JACK GOULD: Thank you. [LR4CA]

SENATOR ASHFORD: Senator McDonald has joined us as well. Welcome, Senator. Any other testifiers on LR4CA? That concludes the hearing. Thanks, Senator Avery. [LR4CA]

SENATOR AVERY: Thank you. [LR4CA]

SENATOR ASHFORD: LB639, Senator Raikes. How many testifiers do we have on LB639? John, some others...how many...okay, good. [LR4CA LB639]

SENATOR RAIKES: Thank you, Senator Ashford and members of the Judiciary Committee. [LB639]

SENATOR ASHFORD: LB639, proceed. [LB639]

SENATOR RAIKES: (Exhibits 1 and 2) Ron Raikes, District 25, here to introduce LB639, which presents a minor adjustment in the way the county attorney functions. [LB639]

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SENATOR ASHFORD: I'm going to write that down. [LB639]

SENATOR RAIKES: LB639 would provide the county attorneys with the control over all legal matters of political subdivisions headquartered in his or her county beginning July 1, 2008. The county attorney would be compensated for the services provided to each political subdivision according to a schedule adopted by the county board. The county attorney would be allowed to employ additional counsel as he or she deems necessary to represent the interests of political subdivisions on civil matters. Such additional counsel would receive reasonable compensation from the governing body of the political subdivision being represented as agreed upon by the governing body, the county attorney, and such additional counsel. The purpose of this bill is to place local government under the same framework as state government with regard to legal representation. At the state level, legal matters are under the charge and control of a single party, the Attorney General. This bill would designate the county attorney as the party singly responsible for control of the legal affairs of local political subdivisions. I'd like to make it clear that this bill does not prevent local subdivisions, political subdivisions from pursuing their legal interests. It simply transfers that effort into the hands of an objective third party, in this case the county attorney. In doing so, it is my belief that two positive consequences may result. First, some legal ventures that are currently being pursued would not be if put under the control of an objective third party. Second, those efforts that are pursued may be done so at a lower cost. There's no doubt that many of the legal matters that confront political subdivisions provoke a great deal of emotion. In some cases, the very existence of a political subdivision is at stake. We've witnessed two examples of this recently in the metro area with regard to the one city, one school district issue and the city of Omaha's pending annexation of Elkhorn. The drawback of this emotion is that it easily colors the objectivity of a political subdivision in deciding whether to pursue legal action. There's also a tendency in situations like these to immediately heed the advice of legal counsel without stopping to consider a second opinion. When faced with a threat, it is a natural reaction for a local entity to do all it can as soon as it can to maintain its interests regardless of the costs. But what happens when the odds are so long or the cost so high that fighting that battle from the standpoint of an unbiased third party isn't worth the cost to the taxpayers? This bill transfers control over legal matters into the hands of such a party who is in a position to make a more reasonable assessment of the situation at hand and who may also be able to represent the interests of the subdivision in a more cost-efficient manner. This bill is intended to raise awareness as to the substantial use of taxpayer dollars on the part of some political subdivisions to pursue litigation. Again, I realize there are occasions when such action is necessary, but at what point does it become too much? The handout I have provided, and there are two of them there, shows the amount of legal expenditures for each public school district in the state for the 2005-06 school year. As you can see, the total spent statewide was \$7.3 million. Of that, \$3.8 million or 52 percent was attributable to the Omaha Public Schools. To some, the fact

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that OPS spent more than any other district makes sense given that it is easily the largest district in the state. However, in an effort to provide context, I put together a sheet, that's the single sheet, that compares the legal expenditures of the 15 largest school districts in terms of enrollment. As you can see, OPS spent nearly \$3,270,000 more in legal fees than the second largest district in the state, Lincoln Public Schools. To better put that in perspective, the amount spent by OPS is more than seven times the amount spent by Lincoln, even though its enrollment is only about 1.4 times larger. What's more, \$81 per student...the \$81 per student spent by OPS in legal fees easily outpaces every other school district in the top 15 in terms of enrollment. These numbers provide an indication that the amount being spent for legal services by the Omaha Public Schools may be excessive. What troubles me about this is the fact that OPS is acting to...is not that OPS is acting to represent its interests. In fact, OPS would continue to be able to represent its interests through the county attorney under the provisions of this bill. The problem is that this money, a significant amount of money, could be used to educate students of the district and instead has ended up as revenue to attorneys who, I'm sure, are very worthy. It is not clear that the broader interests of the state for government entities to wage political battles against each other using public funds. Doing so takes away from the ability of these governments to provide necessary services to their citizens. And when that service is education and those citizens are children, we simply should not allow ourselves to continue down this path. I realize there are concerns that this bill poses an unfunded mandate for county attorneys. That concern is unfounded. Remember LB639 requires that the county board establish a reimbursement schedule for services provided by the county attorney that would apply equally to all political subdivisions. Thus, it is totally within the ability of the county board to ensure that the county attorney is adequately compensated for his or her services. The bill would create an unfunded mandate only to the extent that the schedule adopted by the county board is insufficient. Also some may ask what would happen in the event a county attorney is confronted with having to represent both sides of a legal dispute as would have been the case had this bill been in effect during the Omaha/Elkhorn annexation battle. We have some guidance for that in what the Attorney General does when confronted with competing interests of state entities. In those situations, it's my understanding in speaking with the AG's office that the Attorney General will often represent one of the sides with the other party seeking outside counsel. It'd be possible to use the same approach at the local level, but doing so would result in giving at least one party the opportunity that this bill is intended to avoid. Though it isn't expressed in the bill, a way to avoid this might be for a county attorney to issue an opinion on the matter and see if the two sides might agree to proceed on the basis of that opinion. In the event that one side is not satisfied, the bill could be amended to allow the Attorney General to represent the other side. I'm also open to changing the bill to allow local entities who have an elected representative to be exempt from having to go through the county attorney. Thus, a city with an elected attorney or a school district who might want to create a position for an elected legal representative would be allowed to provide their own legal representation. I'm suspecting that this measure will be met with the same

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reaction as some of the other bills I've introduced in the way of proponent versus opponent testifiers. You'll probably hear opponent testimony from the bar association, county attorneys, as well as individual cities and school districts. That opposition shouldn't come as a surprise if you consider who benefits under the current situation. This bill would eliminate clients as I've previously detailed, some high paying, for attorneys. It would create the potential for an increased workload for county attorneys. Political subdivisions would have a predetermined source of legal representation which many will not support. Meanwhile, the primary beneficiaries of this measure are those whose voices too often go unheard--the taxpayers. This bill will provide some much needed oversight to ensure that the taxpayer dollars, when spent to pursue legal matters, will be spent wisely. Doing so will result in more money being available for the purpose for which they were collected to provide services to the public. With that, Mr. Chairman, I'll close. [LB639]

SENATOR ASHFORD: Any questions of Senator Raikes? I would have a comment. I actually like what you're coming up with. And I have a similar experience at the housing authority. We were spending a tremendous amount of money in outside legal fees. And when we came in three years ago, we opted to use the city attorney's office for a great deal of our work because a lot of it is...much of it is not litigation, but it's dealing with housing issues and so forth and so on. It saved the housing authority around \$250,000 in fees. The only comment I would make is that I think there are...the basic idea I think is very sound. And there are exceptions I think in conflict situations which may not occur on the state side because you really don't have...agencies don't necessarily get into conflict that often on the state side. But the Legislature and certain executive departments have gotten into certain litigation issues or potential litigation issues. But I think it's a sound concept. I don't know how you work it out, but I think it's a sound concept. Thanks. Senator Lathrop. [LB639]

SENATOR LATHROP: I guess I disagree. And I was kind of hoping that somebody that isn't a lawyer would speak up and ask this question. But it strikes me as I look at the list, and I'm dismayed that this kind of money has been spent in the last several years on attorneys. Even though I'm an attorney, it's discouraging to see that OPS has spent \$81.50 a student on litigation expenses. I appreciate your concern for that. It occurs to me that most of the litigation that these political subdivisions do is against one another. And so the practical side of this is, I mean if you just take Millard, for example, and OPS, neither one of them could have used the county attorney over the last year just because their positions would have been adverse to one another. [LB639]

SENATOR RAIKES: A fair point, a fair point. And I tried to mention that in...you know, so if you're going to use this sort of a system, you know, county attorney, Attorney General, or something like that to represent the two sides, but you're certainly correct. In the Douglas County situation in the last couple of years, it's one against the other. [LB639]

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SENATOR LATHROP: Right. Okay. That was the only observation I had. [LB639]

SENATOR ASHFORD: Senator Chambers. [LB639]

SENATOR CHAMBERS: Senator Raikes, in some cases there might be one law firm which has represented the school district, for example, down through the years and that school district becomes a veritable cash cow and litigation is encouraged by that law firm because they make large amounts of money from the taxpayers. [LB639]

SENATOR RAIKES: I am sure that would never happen, Senator. (Laughter) [LB639]

SENATOR CHAMBERS: Well, see, you are a naive economist from Lancaster County so you would be unaware of what happens in big corrupt cities like Omaha. This document that you gave us with a listing of all the school districts covers a period from when to when? [LB639]

SENATOR RAIKES: This would be the 2005-06 school year. [LB639]

SENATOR CHAMBERS: So this \$3,800,000, \$3.8 million, almost \$4 million is from one school year. [LB639]

SENATOR RAIKES: One school year. [LB639]

SENATOR CHAMBERS: And they spent \$81 per student on lawyers and yet they're down here saying that they don't have enough money to carry out the functions of the school district as far as educational duties as they perceive them? Is that what...a statement of the way things are? [LB639]

SENATOR RAIKES: Yes. [LB639]

SENATOR CHAMBERS: If we had a list of other years prior to this, we would have much more than \$3.8 million looking us in the face that OPS has spent on lawyers. [LB639]

SENATOR RAIKES: And I would be happy to try to dig up some more information to go back... [LB639]

SENATOR CHAMBERS: I would appreciate it. [LB639]

SENATOR RAIKES: ...some more years because it would be interesting to me as well. [LB639]

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SENATOR CHAMBERS: If we were going to pay...if we were going to hire 100 teachers, would it cost much more than \$3.8 million a year to hire them in terms of their salary and benefits? The reason I'm giving 100, that number might be calculable in terms of being divided into \$3.8 million and it can be calculated by you because you're an economist rather than me who was educated at OPS. (Laughter) [LB639]

SENATOR RAIKES: Well, I can answer that...I can do that calculation politically and that is that the NSEA would tell you that you could hire in Nebraska way too many teachers with \$3.8 million. (Laughter) [LB639]

SENATOR CHAMBERS: Okay. That's all. Thank you. [LB639]

SENATOR ASHFORD: Yes, Senator Schimek. [LB639]

SENATOR SCHIMEK: Yes, thank you, Mr. Chairman. Senator Raikes, I don't think this is the worst bill that you've ever introduced. I mean we did have a little discussion at lunch today. You don't have nearly as many opponents as you thought you were going to have today, but there's a few. But my question is, first of all, I have a series of questions. First of all, do all cities have city attorneys? [LB639]

SENATOR RAIKES: No, I don't think so. [LB639]

SENATOR SCHIMEK: I don't think so either and that's... [LB639]

SENATOR RAIKES: No, no. [LB639]

SENATOR SCHIMEK: But probably some of the larger communities do have city attorneys. My question is, if this concept is good, why would we not want to put cities under the same umbrella and do away with those elected city attorneys? [LB639]

SENATOR RAIKES: Well, that's a possibility, Senator, but I would say that at least if you do it with an elected city attorney, you have a connection to the taxpayers. [LB639]

SENATOR SCHIMEK: Yeah, I understand the rationale there, yes. And am I to assume that other local subdivisions like NRDs, for instance, would fall under this umbrella? [LB639]

SENATOR RAIKES: Right. Yeah. I think the language is headquartered in the county. [LB639]

SENATOR SCHIMEK: Okay. So what other subdivisions are we talking about I wonder? [LB639]

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SENATOR RAIKES: Well... [LB639]

SENATOR SCHIMEK: It wouldn't be fire districts probably because they'd be under the cities I would assume. [LB639]

SENATOR RAIKES: ESUs would be. Fire districts I don't know, but I guess off the top of my head I would assume they would be as well because they would be headquartered in a county. [LB639]

SENATOR SCHIMEK: Okay. So my question is about all of this. Are you going to have enough attorneys on staff in the county attorney's office who have the specialized subject knowledge to do this kind of thing? I mean obviously when a school district hires an attorney they get somebody who has probably got some kind of a specialty in that area. [LB639]

SENATOR RAIKES: My reaction to that is that you would absolutely need to allow for the possibility of contracting out some of those legal services. The point is even if you did that, you would still have oversight from the county attorney's office, which would involve both some notion or some statement about the merit of the issue being pursued as well as some oversight of the cost involved. [LB639]

SENATOR SCHIMEK: Of the billing... [LB639]

SENATOR RAIKES: Right. [LB639]

SENATOR SCHIMEK: ...of the amount that you're contracting for. [LB639]

SENATOR RAIKES: Right, right. [LB639]

SENATOR SCHIMEK: Okay, thank you. [LB639]

SENATOR ASHFORD: I just have one. Senator Raikes, if we were to limit this to school districts, would you be bothered or do you want it to include all these other subdivisions? [LB639]

SENATOR RAIKES: Well, certainly my interest and the information I've presented to you focuses on school districts so that's something that I know more about. I could certainly be convinced possibly of the case that there are different... [LB639]

SENATOR ASHFORD: Well, I mean I think there's a...the reason I ask that is there's a, I think, very significant public policy issue that you raise about the amount...the Northwest, Grand Island Northwest versus Grand Island situation they've had...they've been in court five times in 10 years or 20 years and fairly major litigation over

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boundaries and obviously...if in fact...and if there were a conflict, the county attorney could in fact get proposals from other law firms that have an expertise or if there's a matter that has need for expertise, special expertise, they could...the county attorney could take proposals for that litigation, but would be monitoring the cost because the county attorney is a public official answerable to the voters, which would be a bit of a check and balance on the amount of money that was spent. [LB639]

SENATOR RAIKES: Two points I'd make. Number one, thanks for bringing up the example of Grand Island Northwest. In fact, we had a bill in our committee whereby one of the parties was trying to put in law that the other party would have to pay the legal fees when the suits were constantly brought about, in effect, employing the one city, one school district policy in Grand Island. The second point I'd make is that depending upon your wishes, certainly school districts would be a place to start. [LB639]

SENATOR ASHFORD: Okay, thank you, Senator. Senator Pirsch, I'm sorry. [LB639]

SENATOR PIRSCH: Forgive me, just a question about the application, if it would be broad enough in your estimation would that include criminal type of legal actions so that those areas such as city of Omaha that have criminal departments, would that be then under the purview then of the county attorney then? [LB639]

SENATOR RAIKES: You're exposing my lack of knowledge about procedures. But my understanding is that in many instances the county attorney now does pursue prosecution on criminal matters. So...but certainly it may make sense to divide the criminal from the civil. You know, one of the examples that was brought up to me by a school district, well, what if a parent brings suit against the school district, our school district for, I've forgotten what the example was, but a special ed program or maybe another matter, would we need to go to the county attorney to pursue this litigation? And my answer from this would be, yes, that's the way it would work. [LB639]

SENATOR PIRSCH: And if I can just follow up with a quick question, assuming a situation where you have let's say an annexation or something that appeared in Douglas County, how would that work as a practical matter? There's obviously the move to annex and at some point in time that's contested, then how would it function under the way you envision your bill? Would it be that the county attorney would, shall, the word you use is shall have, then at that point in time the power to decide issues or when would the county step in at that point in time when there's, I think you had used the example of an annexation or the Elkhorn matter? [LB639]

SENATOR RAIKES: Okay. So specifically your question is how far would the matter need to proceed before the county attorney would... [LB639]

SENATOR PIRSCH: That triggers, yeah. [LB639]

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SENATOR RAIKES: Again, you would know better than I, but I would say the intent to file whatever document you need to begin a legal action. [LB639]

SENATOR ASHFORD: Yes, Senator McDonald. [LB639]

SENATOR McDONALD: I actually had about three questions. One of them, is this legal expenditures, do they put that in their needs formula? Where does this come...how do...who pays for this? [LB639]

SENATOR RAIKES: It would show up in needs only as a part of general fund operating expenditures. But this information comes from the annual financial report that each school district... [LB639]

SENATOR McDONALD: But somebody has to pay this and it's paid out of... [LB639]

SENATOR RAIKES: It's paid out of public funds, yes. [LB639]

SENATOR McDONALD: Public funds. Now do these schools have attorneys on retainer? Do they go out and hire attorneys? How is all that handled? [LB639]

SENATOR RAIKES: Currently, I think both. There are various arrangements. I would be amiss to try to categorize them for you. I know of, you know, large school district that typically uses one law firm. In the metro area events we've had recently, there's a coalition formed and the members of the coalition went together, as I understand it, and hired a law firm to represent their interests. Senator Chambers mentioned that there's sometimes a sort of a longstanding relationship between at least a school district and a law firm that pretty much all the legal work for that district is done by that single law firm. [LB639]

SENATOR McDONALD: And would you say the majority of these expenses comes from boundary disputes? [LB639]

SENATOR RAIKES: I wouldn't. Well, I guess I...over 50 percent in this particular school year was OPS. I don't know what percentage of that amount could be categorized as having to do with the boundary dispute. But there are other legal services included in that. I think they have legal services dedicated to special education programs and any number of any...I wouldn't venture to guess as to whether or not that would be true. [LB639]

SENATOR McDONALD: Okay, thank you. [LB639]

SENATOR ASHFORD: That's a good question, Senator McDonald. I just have one

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thought is if we were to take the learning community in LB1024 and, for example, in the metro case and if other counties or other school districts were to form a learning community under LB1024, we could certainly add into LB1024, amend LB1024 to require that or require a legal relationship that they could hire the county attorney for the learning community. And if a particular district had a specific issue, they could apply to the learning community. Or there's a way you could make a substantial dent in legal fees if the learning community had an attorney that would handle the affairs of the community. [LB639]

SENATOR RAIKES: That's something I hadn't thought about, but that certainly sounds like it would be worth pursuing. [LB639]

SENATOR ASHFORD: Okay, thank you, Senator Raikes. [LB639]

SENATOR RAIKES: Thank you. [LB639]

SENATOR ASHFORD: Any proponents? Proponents? (Laugh) [LB639]

SENATOR LATHROP: (Inaudible) (Laughter) [LB639]

SENATOR ASHFORD: Neutral? No, opponents. Do we have any opponents here? [LB639]

JOHN BONAIUTO: Senator Ashford, members of the committee, John Bonaiuto, J-o-h-n B-o-n-a-i-u-t-o, executive director of Nebraska Association of School Boards. I am not an attorney and I surely don't try to go outside the Education Committee and be an opponent of Senator Raikes' bills. Senator Raikes in his opening made several points and brought issues to the committee's attention obviously that I am not here to refute. Our opposition to this bill is that school boards, as elected officials, in making a choice for an attorney, they develop a relationship with this attorney. And school matters and school issues continue to be extremely complex. And so the school district's legal counsel does have a lot of contact with the school board and the administration on personnel matters and hearing issues and so there are numerous issues that the school district would use their counsel for. What I'm afraid of in this situation is that we're adding a step or the school districts are going to continue to use whatever legal counsel that they have developed a relationship with. And then there's going to be litigation where the county attorney may appoint someone to represent the school district other than their normal legal counsel and so now we're going to have the school board talking to the legal counsel that they have used and have developed a relationship with and then that legal counsel is going to be talking to the legal counsel that the county attorney has appointed to represent the school district. And so I see this as not being a cost savings measure. But I also believe that school districts get involved in proceedings where insurance companies are involved with their errors and omissions

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coverage. And many times the insurance company will select who is going to represent the school district in those proceedings. And Senator Schimek brought a very important point up is that school law tends to be a specialty, and there are groups of attorneys that specialize in school law. And those attorneys represent the vast majority of school districts. And when we look outside the metro area, we're talking there are 230 other school districts that probably aren't listed on your sheet that Senator Raikes has given you that need legal representation that have these relationships with school attorneys. But again, I think the school boards are elected to make these decisions and hopefully if the patrons of the school district are unhappy with the school board's decisions, they've elected these school board members and they can unelect these school board members. With that, I'll conclude my testimony. [LB639]

SENATOR ASHFORD: Thanks, John. Any questions of John? Any other opponents? [LB639]

GARY KRUMLAND: Senator Ashford, members of the committee, my name is Gary Krumland. It's spelled G-a-r-y K-r-u-m-l-a-n-d, representing the League of Nebraska Municipalities, appearing in opposition to LB639. LB639 would basically fundamentally change the role of the city attorney. And in answer to your question, Senator Schimek, Lincoln and Omaha each have in-house, full-time attorneys with multiple attorneys in each office. There are three to five other cities across the state that have full-time city attorneys that changes occasionally depending on the administration. But most cities and villages across the state have an attorney on retainer who has a private practice, but there's not enough business for the city to do full-time practice so they do have an attorney on retainer. The attorney, though, the city attorney does represent the interests of the city. The city council or the mayor can decide whether they want the city attorney to attend each meeting to advise the council on things. This would change that so instead of the role of attorney to be there to represent the interests of the city or the village it would be a separate entity who is making a separate decision on legal matters. And I think that's harmful both for the city interest so I guess we would oppose the bill. Cities are separate legal entities. They're not like a state agency and so they should be able to have their own representation. [LB639]

SENATOR ASHFORD: Yes, Senator Schimek. [LB639]

SENATOR SCHIMEK: Thank you, Mr. Chairman. Gary, I guess I'm curious. There's a letter on our desk here now from Mayor Seng in opposition to the bill (Exhibit 4). She, of course, didn't hear the opening on it and the cities maybe shouldn't be included under this if they had an elected city attorney. But my question was I guess goes to the home rule charter issue, and does this interfere with that at all? [LB639]

GARY KRUMLAND: It could. Lincoln and Omaha both have home rule charters. [LB639]

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SENATOR SCHIMEK: Right. [LB639]

GARY KRUMLAND: And under home rule charter, they do have some independent authority. However, on areas of statewide interest that the Legislature acts upon, that can sometimes overrule the charter. So I would assume that the way this is drafted it may prevent them from having their own in-house attorney. [LB639]

SENATOR SCHIMEK: Okay, thank you. [LB639]

SENATOR ASHFORD: Gary, just a follow up with Senator Schimek's question. If the city attorneys were not involved in this bill and it was just school districts, you wouldn't have any objection. [LB639]

GARY KRUMLAND: Well, no. Our concern is the city attorneys. [LB639]

SENATOR ASHFORD: Thanks, Gary, very much. Any other testifiers on this bill? [LB639]

LARRY RUTH: Mr. Chairman, members of the committee, my name is Larry Ruth. I'm here representing the Eastern Nebraska Development Council and also Nebraska State Bar Association. We take a position in opposition to the bill on behalf of both of those clients and may explain one of those for you a little bit more. The Eastern Nebraska Development Council is a group of folks in Omaha that are heavily involved with development and specifically the sanitary improvement districts form of development. I would just point out that this is one of those kinds of political subdivisions that is very specialized in nature and that has also represent interests that are very narrowly defined and narrowly located in a county. And to spread the cost of that kind of representation on the different kinds of issues that they're interested in would really put the cost, which is very local in nature, across the county as a whole. They have interest in such things as zoning and annexation, and those may be in conflict with the county attorney in that area or the county in that area. For the reasons presented by Mr. Bonaiuto and Mr. Krumland, we would oppose the bill. [LB639]

SENATOR ASHFORD: Same question--if we just limited this to school districts, it wouldn't bother you? [LB639]

LARRY RUTH: I don't have a position on that, Senator. I'd be happy to get back to you on it. [LB639]

SENATOR ASHFORD: Okay. Thank you very much. [LB639]

SENATOR CHAMBERS: Mr. Ruth, you said you agree with the reasons provided by Mr.

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Krumland and Mr. Bonaiuto. [LB639]

LARRY RUTH: Generally speaking, yes, Senator. [LB639]

SENATOR CHAMBERS: Are you going to split your fee with them? [LB639]

LARRY RUTH: (Laughs) [LB639]

SENATOR CHAMBERS: That's a good enough answer. Thank you. [LB639]

LARRY RUTH: Thank you very much. [LB639]

SENATOR ASHFORD: Thank you, Larry. Any neutral testifier? Is there another opponent? Proponent? [LB639]

C. JO PETERSEN: Good afternoon, Senator Ashford, committee members. My name is Jo Petersen, J-o P-e-t-e-r-s-e-n. I'm a prosecutor and represent the Nebraska County Attorneys Association in opposition of this bill. There are a variety of reasons that we oppose this bill, but there are probably two main ones. One is the number of attorneys that would be required to be added to the county attorneys' offices and that raises a whole list of issues for costs, benefits, housing, availability of attorneys, especially when you get out into rural Nebraska. That issue is not addressed in the bill and would need to be. But probably more importantly is the conflict issue. If county attorneys are made the attorney of representation for all of the political subdivisions within the county, there would be conflicts that would exist on a monthly, maybe weekly, maybe even daily basis. Many times the actions of political subdivisions are actions that affect other political subdivisions surrounding them and certainly within the county. In fact, if county attorneys offices were providing legal advice to a couple of those political subdivisions and they got into a dispute or became at odds over an issue, the county attorney's office would not most likely be able to represent either one of those entities. And you would end up having to go outside for legal counsel and have to pay for that in addition to the ongoing county attorney's office which you have in place and additional attorneys to represent those entities. There are all kinds of issues that come into play. You have zoning issues, budget, taxes, interlocal agreements, contracts. Each of those involve political subdivisions acting with each other or against each other. Even when they're in cooperation, as an attorney you have an obligation to get the best result for your client. If the county attorney's office was responsible for each of the political subdivisions, there is no way that they could take a position on one side or the other. There is no way they would be able to opt out on one side and still represent the other side if they were providing them legal advice throughout the time period preceding that. It's not like they can jump into the middle of it and ignore things that they were talking about previously. There would be inside information that they would have that would directly affect their ability to represent either one of those clients. And it's for those reasons but mostly

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because of that conflict issue that the County Attorneys Association opposes this bill. If you have any questions, I would be glad to answer those. [LB639]

SENATOR ASHFORD: Thank you, Ms. Petersen. Any questions? If we had a...if the county attorney were the attorney for the school district and nothing else, obviously that conflict problem would be minimized because you'd have many fewer parties. [LB639]

C. JO PETERSEN: It would be minimized. It would still exist. [LB639]

SENATOR ASHFORD: There would be...in a case like that, could not there be a conflict resolution and the school district could hire other counsel? [LB639]

C. JO PETERSEN: If there is a dispute between the county and the school district, you would have to hire most likely two separate attorneys to handle that. [LB639]

SENATOR ASHFORD: Well, possibly, but... [LB639]

C. JO PETERSEN: And I think the point is well taken from the school districts that that is a very specialized area of law. I would guess most county attorneys don't have very good specific knowledge of that and would have to hire counsel and cost the taxpayers regardless. [LB639]

SENATOR ASHFORD: Well, what if that cost were...I agree with you, but you could handle that through interlocal agreement as well, could you not? You could have the county attorney could in effect charge the school district a reasonable fee under an interlocal agreement to represent the... [LB639]

C. JO PETERSEN: You would. You may end up in the same exact boat you're in now. I'm not sure that that's... [LB639]

SENATOR ASHFORD: Maybe, but I mean... [LB639]

C. JO PETERSEN: ...you're gaining any cost efficiency in that regard. And once you have a conflict, you run back into the same problem of if you have a conflict within the office, the whole office is out so you end up having to hire two counsel [LB639]

SENATOR ASHFORD: Well, you can always find...I mean if you look hard enough you could find a potential conflict. But I'm just talking about from a day-to-day business of a school district it could be handled by someone in the county attorney's office at an agreed-upon fee that would be paid to the school district. And you're right, I mean, you'd have to look at the cost analysis and all that but that's possible, is it not? [LB639]

C. JO PETERSEN: Well, it's certainly possible. I think you run the same gambit that

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you'd have to hire someone that had those specialties. [LB639]

SENATOR ASHFORD: Okay. [LB639]

C. JO PETERSEN: I'm not sure it saves either party in that regard. [LB639]

SENATOR ASHFORD: Okay, well, I appreciate it. Thanks for your testimony. Any other...Senator Chambers. [LB639]

SENATOR CHAMBERS: Could you give me an example of a conflict that would occur between a county attorney's office and a school district? [LB639]

C. JO PETERSEN: I can. I can give you one that I've actually participated in. The school district is required to submit a budget to the county clerk. The county clerk then has to publish that budget and jump through the hoops to see to it that that budget can be adopted. If the county clerk makes an error, either doesn't get it published in time or publishes an incorrect number, the school board then sues the county. You immediately have a conflict between the two with regard to which would you represent in that entity when you were probably providing them both with legal advice. [LB639]

SENATOR CHAMBERS: That's a simple matter to resolve though. I don't see that as a complex legal issue at all. [LB639]

C. JO PETERSEN: That went all the way up to the Nebraska Court of Appeals on that particular issue so. [LB639]

SENATOR CHAMBERS: Simple issues often go far, but there are no complex legal issues involved in a...tell me the most complex legal issue in that case. One says you should have; the other one says, no, I shouldn't have. One says I did; the other says I didn't. [LB639]

C. JO PETERSEN: And the issue actually had to do with the responsibilities of the clerk is what it came down to, what obligation she had to publish and whether or not the school board had an obligation to oversee that. [LB639]

SENATOR CHAMBERS: That's a simple legal issue as I perceive it. [LB639]

C. JO PETERSEN: I don't disagree, but it still would require separate legal counsel. [LB639]

SENATOR CHAMBERS: And it wouldn't take much for any lawyer with ordinary training as an attorney and some experience to handle a case like that. It wouldn't take specialized knowledge, in other words, in my opinion, to resolve an issue as to where

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responsibility resides. That could happen anywhere. It's not unique to the county. It's not unique to a school district. [LB639]

C. JO PETERSEN: I would agree with you in that instance. I think there is a great deal of school law that is specialized, however. And if we're going to provide all legal advice to the school district... [LB639]

SENATOR CHAMBERS: But, my friend, I did not give that example. You did. So I want you to give me an example of a complicated conflict...I want to know of another kind of conflict that would occur between the county and the school district. [LB639]

C. JO PETERSEN: And I'm not sure I can answer that, Senator Chambers, because I don't do school law. I have very little contact with the school districts and school law and don't practice in that area. As a prosecutor, I'm not involved with that. [LB639]

SENATOR CHAMBERS: One final question. The County Attorneys Association will send various attorneys to speak for and represent their position. Why were you selected on a question like this when you have no ability to answer the types of questions that might arise? [LB639]

C. JO PETERSEN: Well, I guess I was selected because I was available and do have knowledge. I've been prosecuting for about 22 years. I've been Seward County Attorney for eight years. I have been a deputy prosecutor in about six other counties that do address issues with school districts. Right now I can tell you there are various school cases pending that involve transfer of property from one tax roll to another. Those issues are pending before district courts. [LB639]

SENATOR CHAMBERS: And you say that's the kind of conflict that would develop between the county and the school district. [LB639]

C. JO PETERSEN: That's certainly one that the school district could take a position different than the county takes. In this case they did not, but they could. [LB639]

SENATOR CHAMBERS: Now does a person have to have specialized knowledge to deal with an issue involving the transfer of property? [LB639]

C. JO PETERSEN: In this particular case as a county attorney I can tell you that I certainly had to educate myself with regard to those particular issues. However, can any attorney do that? Certainly. I can educate myself on any law. [LB639]

SENATOR CHAMBERS: So you could have hired an attorney. You could easily handle an issue of property law. There are numerous lawyers... [LB639]

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C. JO PETERSEN: Correct. [LB639]

SENATOR CHAMBERS: ...who handle property cases and that one is not complicated either. [LB639]

C. JO PETERSEN: I didn't say that was complicated. I said that was one of the issues out there. Can I tell you of a...I don't know what you consider a complicated issue, Senator. [LB639]

SENATOR CHAMBERS: Where will the expense come from because it's not going to take a lot of billable hours to deal with that situation. Even if it takes a long time for it to be resolved as it goes through the courts, lawyers are not compiling billable hours while this thing moves or sits in one place rather than another. [LB639]

C. JO PETERSEN: They are. I can tell you that they are but... [LB639]

SENATOR CHAMBERS: Oh, so then you pay a...if an action is filed in the lowest court, let's say a county court, and it winds up going to the Supreme Court, in addition to the filing of the papers, these lawyers are getting paid while that moves even if they're not doing any action on it? [LB639]

C. JO PETERSEN: Oh, no. I'm certain they are doing some sort of action on it, researching, preparing briefs, arguing in front of the courts. There are ongoing charges. Those wouldn't be to the county in the cases of the transfer of property, but they would be in the instance when a county got sued by the school board. [LB639]

SENATOR CHAMBERS: Okay. I don't have any more questions. Thank you very much. [LB639]

SENATOR ASHFORD: Someone had another...Senator Pirsch. [LB639]

SENATOR PIRSCH: I guess one of the underlying premises of this legislation is that there may be times quite frequently where the political subdivisions may be interested in pursuing legal action that may not be merited and that the county can kind of play a regulatory role in that. And I guess I'm not sure, but is there any time, following the law of unintended consequences, where the reverse may be true where the county would pursue an interest in the name of a local political subdivision, knowing that the cost will be borne by that political subdivision? I mean is that a possibility that the county may "unintendedly" be more interested in going after a particular case or being litigious in a way that the political subdivision would not have been in the name of the political subdivision? [LB639]

C. JO PETERSEN: It would depend on if there was a benefit that the county sought to

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gain from that. I don't see that the county would get itself involved in litigation of the political subdivision, a village or a city, absent some direct effect or benefit or loss to the county. I'm not sure if that answers your question, but that would be the occasions where I would see the county either tagging along requesting litigation or entering into an agreement to pursue litigation with a political subdivision. That does occur, but it's often against another political subdivision. [LB639]

SENATOR PIRSCH: Okay (inaudible). [LB639]

SENATOR LATHROP: Can I ask a couple questions? [LB639]

SENATOR ASHFORD: Sure. [LB639]

SENATOR LATHROP: If you were the county attorney in Douglas County with the school litigation that was going on, the lobbying that was done by law firms, would you have been able to represent anybody in that instance? [LB639]

C. JO PETERSEN: If in fact this bill was in place? [LB639]

SENATOR LATHROP: Yes. [LB639]

C. JO PETERSEN: I believe not. [LB639]

SENATOR LATHROP: Okay. The problem is that OPS stood against the interest of other people, other school districts in the county. [LB639]

C. JO PETERSEN: Correct. [LB639]

SENATOR LATHROP: And once you have two clients, you have a conflict of interest, you've got to get out of it completely. [LB639]

C. JO PETERSEN: I agree. [LB639]

SENATOR LATHROP: And then you have to go hire help or outside counsel anyway. Is that... [LB639]

C. JO PETERSEN: That's correct. []

SENATOR LATHROP: And when you hire outside counsel on a case-by-case basis, is it more expensive than if you have an ongoing relationship with a law firm? [LB639]

C. JO PETERSON: It can be, yes. [LB639]

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SENATOR LATHROP: In other words, if you have an ongoing relationship, typically the law firm will say, I'll work for x number of dollars less than my usual rate because I have an ongoing relationship with you. [LB639]

C. JO PETERSEN: Correct, or you have an agreement in place for those fees. [LB639]

SENATOR LATHROP: Okay. The other question I have for you or a series of questions is if you are...you're in the Seward County Attorney's office, is that right? [LB639]

C. JO PETERSEN: Currently I'm in the Hamilton and Saunders County Attorney's offices. [LB639]

SENATOR LATHROP: Hamilton and Saunders, okay. How many lawyers are in those county attorney's offices? [LB639]

C. JO PETERSEN: In the Hamilton County Attorney's office there are three; two are part-time, well, all three are part-time. In the Saunders County Attorney's office, there are four; two are part-time. [LB639]

SENATOR LATHROP: Part of the difficulty with this idea is that there's a practical staffing issue as well, is there not? [LB639]

C. JO PETERSEN: That's correct. [LB639]

SENATOR LATHROP: In other words, if you're going to have enough lawyers to take care of everything that could go on that a lot of times the lawyers are going to spend time doing nothing, waiting for all of the work to come that way. [LB639]

C. JO PETERSEN: That's correct. You would have to add a number of lawyers in every county in the state. [LB639]

SENATOR LATHROP: In a lot of different subspecialties as well. [LB639]

C. JO PETERSEN: Correct. [LB639]

SENATOR LATHROP: Okay, that's my questioning. [LB639]

SENATOR ASHFORD: Thank you, Senator Lathrop. Any other...part of the conflict problem is that we have so many political subdivisions (laugh). [LB639]

C. JO PETERSEN: Correct. [LB639]

SENATOR ASHFORD: If we had fewer political subdivisions that weren't suing each

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other all the time, then we'd maybe have fewer conflicts and fewer legal fees and... [LB639]

C. JO PETERSEN: I think Seward County I can think of 20 to 25 political subdivisions and that's not maybe adding in the SIDs or any of those. [LB639]

SENATOR ASHFORD: And I appreciate, I think you're giving good answers, but I still think there's an overriding benefit to having some working together. Thanks very much. [LB639]

C. JO PETERSEN: Thank you. [LB639]

SENATOR ASHFORD: Any other opponents? Neutral? A neutral crept up at the end here. [LB639]

JOHN SPATZ: Good afternoon, Senator Ashford and members of the committee. My name is John Spatz, but it's spelled S-p-a-t-z, and I'm just here as an individual and to see if I could maybe answer any questions. I'm a member of the Council of School Attorneys and there's approximately 55ish, 54, 55 members statewide of the Council of School Attorneys and they probably represent 90 percent or more of the school districts in the state. A concern perhaps would be is if each county would have to hire somebody that could address school specific issues, there's 93 counties or if 80 counties did this, I don't know if it would be the cost savings that you think it may be. It might be, but I just wanted to say that there's approximately 55 attorneys statewide. [LB639]

SENATOR ASHFORD: Well, you have to dig down into what school districts are spending money for to determine whether or not it's a cost savings. [LB639]

JOHN SPATZ: Yeah. [LB639]

SENATOR ASHFORD: I mean...which district do you represent? [LB639]

JOHN SPATZ: I don't represent a district. I'm the legal counsel of the school boards association, but I just wanted to... [LB639]

SENATOR ASHFORD: Okay, that's right. I'm sorry. I knew that I guess. [LB639]

JOHN SPATZ: So it wouldn't affect me one way or the other but... [LB639]

SENATOR ASHFORD: Do you think \$3.5 million is a lot of money for a school district to spend in one year for legal fees? [LB639]

JOHN SPATZ: Well, I suppose it depends on what's going on is a cost... [LB639]

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SENATOR ASHFORD: That's a lot of money under any definition when there's not someone being tried for murder or... [LB639]

JOHN SPATZ: Right. Well, primarily, you know, the majority of the Council of School Attorneys represent, for example, one attorney may live in a rural area and represent 10 or 15 districts in around that area. [LB639]

SENATOR ASHFORD: I understand that point and I think that's a valid point. But I think it raises the ire I think and the eyebrows of the taxpayer when you're spending millions and millions and millions of dollars and nothing has happened. So I (laugh), you know, that's hard. Okay, thank you. [LB639]

JOHN SPATZ: I understand. Okay, that's fine. [LB639]

SENATOR ASHFORD: Yeah, Senator Chambers. [LB639]

SENATOR CHAMBERS: How long have you held the job that you now occupy? [LB639]

JOHN SPATZ: Three and a half years. [LB639]

SENATOR CHAMBERS: Did you know that OPS spent \$3,800,000 last year? Did you know that? [LB639]

JOHN SPATZ: I did not know what the sum was, no. [LB639]

SENATOR CHAMBERS: Did that figure surprise you when you saw it? [LB639]

JOHN SPATZ: Um... [LB639]

SENATOR CHAMBERS: You're taking too long. I want a spontaneous outburst. [LB639]

JOHN SPATZ: No, I guess not because I knew there were a lot of legal fees in that district. It didn't surprise me. [LB639]

SENATOR CHAMBERS: Well, the only way you'd know that is if they had a lot of legal fees prior to that, isn't that true? [LB639]

JOHN SPATZ: Well... [LB639]

SENATOR CHAMBERS: How would you know there are a lot of legal fees? [LB639]

JOHN SPATZ: Well, because I know the litigation that's going on in OPS right now.

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[LB639]

SENATOR CHAMBERS: And do you know what law firm is handling the litigation?  
[LB639]

JOHN SPATZ: I know some of the lawyers, yeah. [LB639]

SENATOR CHAMBERS: And you're aware that they charge quite a bit by the hour?  
[LB639]

JOHN SPATZ: I don't know what they charge per hour. I have no idea. [LB639]

SENATOR CHAMBERS: I didn't ask a dollar amount but quite a bit. How do you get paid? [LB639]

JOHN SPATZ: Well, it depends on... [LB639]

SENATOR CHAMBERS: Do you get paid by the hour or by the year? [LB639]

JOHN SPATZ: No, I'm salaried. [LB639]

SENATOR CHAMBERS: So it doesn't matter whether you do anything or not. [LB639]

JOHN SPATZ: That's true. (Laughter) [LB639]

SENATOR CHAMBERS: Okay. But you know that... [LB639]

JOHN SPATZ: My boss is here, though, so I spend a lot of time working. [LB639]

SENATOR CHAMBERS: I'm not saying you don't do anything. [LB639]

JOHN SPATZ: Okay, thank you. Thank you. [LB639]

SENATOR CHAMBERS: Whatever these cheapskates paid you you're earning this afternoon. (Laughter) [LB639]

JOHN SPATZ: That's right, that's right. Thank you. Thank you. I appreciate that.  
[LB639]

SENATOR CHAMBERS: Okay. And on that high note, I don't have any more questions.  
Thank you. [LB639]

JOHN SPATZ: Okay. You can send a letter to my boss saying that to me (laugh). Okay,

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thanks. [LB639]

SENATOR ASHFORD: That concludes that hearing. It probably went longer than we thought. Let's move on. I think Senator Raikes waives I believe. Is his counsel here? Kris, did he waive his closing? Thanks. (See also Exhibit 3) LB246. [LB639]

JONATHAN BRADFORD: No. []

SENATOR ASHFORD: No? []

JONATHAN BRADFORD: LB142. [LB142]

SENATOR ASHFORD: What happened to...oh, I'm sorry. Senator Friend, LB142. [LB142]

SENATOR FRIEND: I told Senator Raikes I'd put the fire out so. I can't keep doing that for him. [LB142]

SENATOR ASHFORD: Don't say fire, Senator Friend, please. [LB142]

SENATOR CHAMBERS: While you all are kibitzing, Senator Friend, your attendance is better here now that you're not a member of the committee than it was when you... [LB142]

SENATOR FRIEND: That is not true. That is unequivocally false. [LB142]

SENATOR CHAMBERS: I'm just kidding. [LB142]

SENATOR FRIEND: (Exhibit 5) I know. I know you are. Members of the Judiciary Committee and Chairman Ashford, my name is Mike Friend, spelled F-r-i-e-n-d. I represent northwest Omaha District 10 in the Nebraska Legislature. LB142 I'm carrying on behalf of the Nebraska Attorney General's office. The Nebraska Attorney General's office came to me this summer. We talked, we discussed some subject matter here. I guess I came to them and talked about a little of this too. This bill is intended to give children and adult victims of abuse in domestic violence the weapons they need to fight certain types of harassment. The bill in a lot of ways would bring our intimidation laws into the twenty-first century by adding computers and electronic communication devices to the list of punishable harassment methods. Currently, our laws only refer to the telephone type of contact. LB142 increases the penalties for all crimes of intimidation from a Class III misdemeanor up to three months in jail or a \$1,000 fine to a Class I misdemeanor, up to one year in jail and a \$1,000 fine. I think most importantly the bill makes it a felony for an adult over 18 to send sexually explicit material to a child under 16. A Class IV felony brings 0 to 5 years in prison and a \$10,000 fine. A lot of folks

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would ask why we need it right now or why do we need it at all? I'd like to throw out what I would consider some startling statistics, the statistics in 2006 that we found from the National Center for Missing and Exploited Children. One in seven children who regularly use the Internet is sexually solicited. One in 11 is harassed or threatened. Thirty-one percent receive an aggressive sexual solicitation or are asked to meet that particular person. This bill also gives victims of domestic violence and abuse recourse for action when they are being harassed through electronic communications. Currently using electronic communications to monitor and harass a partner is not a chargeable offense. An example is this: In a recent case a husband installed software on his soon-to-be ex-wife's computer while he was at her house on a parental visitation. The software notified him when she received or sent e-mail, sent him a copy of that e-mail, so we're talking Spyware here, and kept track of every location that she visited on the web. He used that information to harass her and for leverage in their divorce and child custody disputes. There was little law enforcement under those circumstances that little law enforcement could do to help her. Currently there are no provisions in Nebraska law for cyber intimidation offenses. I wanted to let you know also that we have been doing some work and the Attorney General's office has been working through some of the ambiguities of the green copy. What I would like you to consider is AM377 on the top that I've had distributed. Although it is in white copy form, it is a...and it's going to make the bill easier to read. We replaced the whole green copy I guess is what I'm getting at with that amendment. The amendment would strike "annoy or offend" from subsection (1). It's been determined that these were overly broad or could be determined as overly broad. We don't want to criminalize with a Class I misdemeanor the occasional annoying behavior or offensive comment. We strike "anonymously" as well because these acts should be criminal regardless of whether the identity of the offender is known or not. Next and the amendment would more clearly and specifically define the offense of enticement by an adult age 19 or over by communicating when the child is 16 years of age or younger. Age 19 or over is the age threshold for a first-degree sexual assault of a child. And 16 or under is the same age used for the on-line enticement law passed by our Legislature in 2004. The amendment would also clarify that a person contacting a peace officer in this manner who is believed to be 16 or younger, that would also be a Class IV felony. Intimidation tactics by criminals have changed. I think that's why we're here with this bill. Our laws, we believe, need to be changed with the changing of those criminal tactics. This bill will make sure that...this bill will help make sure that a lot of that happens. I would ask the Judiciary Committee to join me and hopefully the full Legislature in implementing some enhancements to our law in this area. With that, I know that the Attorney General's office and others are behind me to speak to this issue, but I would be happy to address some of the things that I can. [LB142]

SENATOR ASHFORD: Thank you, Senator Friend. Any questions? Yes. [LB142]

SENATOR CHAMBERS: I have a question. Senator Friend, I'm looking at the amendment now. [LB142]

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SENATOR FRIEND: Okay. [LB142]

SENATOR CHAMBERS: Do you have a copy of it before you? [LB142]

SENATOR FRIEND: I do, I think the most updated one, yeah. [LB142]

SENATOR CHAMBERS: On page 1 in line 17... [LB142]

SENATOR FRIEND: Yes. [LB142]

SENATOR CHAMBERS: ...you're talking about a depiction of sexually explicit conduct as that term is defined. And you transmit it by sound. Answer me this question: Would this be such a sound, oooh, oooh, could that be... [LB142]

SENATOR FRIEND: If I were offended by that, Senator Chambers... [LB142]

SENATOR CHAMBERS: Could that be a depiction of sexually explicit conduct? It says sound. It doesn't say words, a sound. [LB142]

SENATOR FRIEND: I think it could be, yes. [LB142]

SENATOR CHAMBERS: So a groan or a moan that could be interpreted as somebody in the throes of sexual intercourse could be a basis for a charge under this bill. [LB142]

SENATOR FRIEND: Possibly. But what I would also add is that if you were to make that phone call to me, I guess I'm assuming that you made that phone call. (Laughter) [LB142]

SENATOR CHAMBERS: To you, as if I made the call to you. I wouldn't (inaudible). But anyway, make your point. If Senator McGill made that call to you. [LB142]

SENATOR MCGILL: No. (Laughter) [LB142]

SENATOR CHAMBERS: Okay. (Inaudible). Okay. [LB142]

SENATOR FRIEND: If a person were to make that phone call and make those...the particular sounds that could be considered offensive, the intent would have to be there and the harassment would have to be there, too, if I'm not mistaken. And that could be prosecuted now if an aggressive prosecutor is in a position where they can prove that the victim on the other end was indeed victimized. You see what I'm saying? [LB142]

SENATOR CHAMBERS: What do they need sound for? You don't have to answer this.

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I'll ask whoever comes from the Attorney General's office. I'm trying to find out what that adds to this catalog of other things they've already got there. [LB142]

SENATOR FRIEND: There may be things electronically. I know that you can do things electronically that you may not be able to do and visually that you may not be able to do...the type of things that you can do with those electronic devices and that may be covering that ground. [LB142]

SENATOR CHAMBERS: Okay. That's all I'll ask you but thank you. [LB142]

SENATOR FRIEND: Yeah, that's what I think. [LB142]

SENATOR CHAMBERS: That was to tip them off so they can be preparing an answer. [LB142]

SENATOR FRIEND: Okay. [LB142]

SENATOR CHAMBERS: Thank you, Senator Friend. [LB142]

SENATOR ASHFORD: Senator McGill, I'm sorry, did you have a question? [LB142]

SENATOR MCGILL: No. [LB142]

SENATOR ASHFORD: Okay. [LB142]

SENATOR MCGILL: (Inaudible) nothing else (laugh). [LB142]

SENATOR ASHFORD: I thought you did. I apologize. Thank you, Senator Friend. [LB142]

SENATOR FRIEND: Thank you. [LB142]

SENATOR ASHFORD: How many proponents do we have for this bill? Opponents? Okay. Next proponent. [LB142]

COREY O'BRIEN: Good afternoon, Mr. Chairman. My name is Corey O'Brien, that's C-o-r-e-y O-'-B-r-i-e-n, and I'm an assistant Attorney General with the drug and violent crime division of the Nebraska Attorney General's Office. Today I come before you on behalf of Attorney General Jon Bruning, the Nebraska Attorney General's office, and the Nebraska County Attorneys Association to voice support for LB142. From the perspective of a prosecutor, LB142 accomplishes two important and long overdue objectives. First, it updates Nebraska's existing telephone harassment law by adding a prohibition against harassing behaviors accomplished by use of a computer or other

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electronic communication device such as Blackberrys and cell phone text messaging. The fact that one uses a Blackberry or a computer to engage in these types of activities as opposed to a telephone makes it no less frightening. Therefore, LB142 seeks to protect Nebraskans, regardless of the mechanism utilized to perpetuate it. Further, LB142 would give judges greater latitude in sentencing offenders convicted of using a telephone, computer, or electronic communication device to harass another by increasing the penalty classification from a Class III misdemeanor to a Class I misdemeanor. The second perhaps most significant objective accomplished by LB142 is the creation of a crime prohibiting the practice of using a telephone, computer, or electronic communication device to entice children or distribute sexually explicit materials to them. The Internet is a magnificent tool and brings the world into the homes and schools of Nebraska's children. Unfortunately, interspersed amongst the marvels of the Internet are evildoers who wish to inflict harm upon them. As recent television programs like NBC Dateline's To Catch a Predator series have documented, enticement of children via the Internet has become an ever increasing occurrence, and I can report that it is no less so here in Nebraska. Each hour of every day there are people here in Nebraska and worldwide using the Internet in an attempt to sexually exploit children in Nebraska. The most common way they attempt to do so is by employing what is commonly referred to as grooming behaviors. Usually, these grooming behaviors include the distribution of pornographic images or explicit sexual materials. Frequently, an on-line predator will employ real-time pornographic displays to children through the use of web cams and will ask the children they are corresponding with to reciprocate. As someone who has seen these activities firsthand, it is shocking and disturbing to see a computer screen filled with multiple adults pleasuring themselves via a web cam. They do so in an effort to entice a child to experience the real thing. As part of my job of traveling around the state of Nebraska prosecuting people who use the Internet to harm children, I frequently have the opportunity to give Internet safety presentations to Nebraska's school children. This past December I was giving such a presentation to a group of elementary school kids in tiny Elmwood-Murdock School District. A third grade student there informed me while he was in a game room that he encountered an adult male who wished to show him his penis. When that child didn't respond, he was shown such an image. Nebraska has been in the forefront in combatting this issue. With the passage of LB943 in 2003 and our suit against the Internet service provider Yahoo! in 2005 that effectively closed down many of their predator-laden chat rooms, LB142 will ensure that we remain in the forefront in this area. While prosecutors and law enforcement were ecstatic with the Unicameral's passage of LB943 in 2003, that law is limited to the prosecution of offenders who actually use the computer and who agree to and do eventually meet a child or police officer portraying a child with the intent of engaging in sex. If, however, they use a communication device other than a computer, they never meet, or meet without having displayed an intent to engage in sexual activity, then there has been no crime committed, even though substantial and lingering harm has been inflicted. Under LB142, this will now be a Class IV felony. I personally would like to thank Senator Friend for his leadership in this area and for agreeing to carry this

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most important legislative effort. At this time, I would certainly invite any questions you may have for me on this issue. [LB142]

SENATOR ASHFORD: Thanks, Corey. Any questions of Mr. O'Brien? Senator Chambers. [LB142]

SENATOR CHAMBERS: Does enticement apply only to children because you're creating these offenses I think on pages 2 and 3? I'm just now getting the amendment so... [LB142]

COREY O'BRIEN: The enticement section, Senator, is intended to apply to children. That would be the dissemination of sexually explicit materials or materials that involve written language that could be considered obscene such as the writings that we normally see on the Internet. So that portion of the statute does apply to children under the age of 16 sent by someone that is over the age of 18, 19 or over. [LB142]

SENATOR CHAMBERS: Does this entire section...here's what I'm getting at. As I look at the way this amendment is drafted, on page 2 we have subsection (2) beginning in line 9. And that's where we talk about the ages of the perpetrator and the purported victim because the victim need not be a youngster but a peace officer that the perpetrator thinks... [LB142]

COREY O'BRIEN: Yes, sir. [LB142]

SENATOR CHAMBERS: Okay. Then that subsection ends with a period in line 21. Now we come to subsection (3) where I don't see the mention of an age at all. And in subsection (4) I don't see the mention of an age. The only one that I see that mentions age is subsection (2). Am I right or wrong? [LB142]

COREY O'BRIEN: I believe that's accurate, Your Honor, or I'm sorry...Your Honor, I've been in court all day. I apologize. [LB142]

SENATOR CHAMBERS: What did you say? [LB142]

COREY O'BRIEN: Your Honor. I apologize. [LB142]

SENATOR CHAMBERS: Please don't. That's (inaudible). Now I understand that because... [LB142]

COREY O'BRIEN: I've been in court all day long so, you know. [LB142]

SENATOR CHAMBERS: I might call you Senator before it's over, but I'll try not to so I understand that whatever you've been saying all day that's what you will tend to come

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out. I don't really mind. [LB142]

COREY O'BRIEN: I apologize, Senator. [LB142]

SENATOR CHAMBERS: Okay, that's okay. Here's what I want to get to. The part in subsection (2) deals with the age, and right now I'm not even going to concern myself with that. But subsection (3), subsection (4) are general crimes that would apply regardless of the age of the perpetrator or the victim. True? [LB142]

COREY O'BRIEN: Senator, I believe that the intent of those subsections, subsection (3) through (5) are intended to apply to clarify language throughout the entire statute itself. I don't know necessarily that they set out specific crimes themselves. [LB142]

SENATOR CHAMBERS: But what I'm saying, they relate to persons doing this regardless of their age. These crimes don't exist in this form because the victim is a youngster. This could be an adult doing this to another adult and these crimes would be committed. Is that true? [LB142]

COREY O'BRIEN: Under subsection (1), yes. [LB142]

SENATOR CHAMBERS: And in subsection (3), show me where there's anything that indicates it applies only where the victim is young. [LB142]

COREY O'BRIEN: The way I...in my copy of the amendment that I have before me, it says subsection (3) is "The use of indecent, lewd, or obscene language or the making of a threat or lewd suggestion shall be prima facie evidence of intent to terrify, intimidate, threaten, harass, annoy, or offend." Does that comport with yours, Senator? [LB142]

SENATOR CHAMBERS: Tell me the page and the line again. [LB142]

COREY O'BRIEN: Okay. Can I have a copy of what you received because I do not have that with me. [LB142]

SENATOR CHAMBERS: Oh, maybe that's why we're out of sync because you're not looking at what I'm looking at. [LB142]

COREY O'BRIEN: I probably have another draft of the amendment so thank you, Senator Pedersen. [LB142]

SENATOR CHAMBERS: Okay. In the upper right-hand corner of your amendment now does it say AM377? [LB142]

COREY O'BRIEN: It does. [LB142]

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SENATOR CHAMBERS: Okay. Now we'll be together. [LB142]

COREY O'BRIEN: Mine says AM330 so. [LB142]

SENATOR CHAMBERS: Okay. [LB142]

COREY O'BRIEN: Okay. [LB142]

SENATOR CHAMBERS: Now if you turn to page 2 in subsection (2) beginning in line 9. [LB142]

SENATOR ASHFORD: Do they have the wrong amendments? Are there other amendments? Oh, okay, I'm sorry. Excuse me, Senator Chambers. I... [LB142]

SENATOR CHAMBERS: That's all right. You're the chairman. You can do whatever you want to. [LB142]

SENATOR ASHFORD: Well, I was confused. Being confused, I can do that. [LB142]

SENATOR CHAMBERS: Well, you can be confused. You can do whatever you want to do. Okay. [LB142]

SENATOR ASHFORD: But now I'm not confused because we've got the right... [LB142]

COREY O'BRIEN: I'm hoping I'm not either so. [LB142]

SENATOR CHAMBERS: Now in this subsection that runs from line 9 to line 21, we're talking about persons of differing ages. The perpetrator is above a certain age and the victim is under a certain age. I'm not dealing with that... [LB142]

COREY O'BRIEN: Yes, sir. [LB142]

SENATOR CHAMBERS: ...because that tells us we're dealing with youngsters. When we get to subsection (3) beginning in line 22, there is no age involved so this crime is committed even if it is one adult engaging in this conduct toward another adult. Do you agree? I'll let you look at it since you just got the amendment. [LB142]

COREY O'BRIEN: And I'm going to just make sure that I'm clear. The subsection (3) that you're looking at it says, "Intimidation by telephone call or enticement by telephone call..." [LB142]

SENATOR CHAMBERS: Yes. [LB142]

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COREY O'BRIEN: ..."shall be deemed to have been committed either at the place where the contact was initiated or where it was received." [LB142]

SENATOR CHAMBERS: Yes. [LB142]

COREY O'BRIEN: Okay. [LB142]

SENATOR CHAMBERS: Okay. Then in subsection (4) so that we get to what level of offense this is. [LB142]

COREY O'BRIEN: Yes. [LB142]

SENATOR CHAMBERS: "Intimidation by telephone call" and so forth. Intimidation is a Class I misdemeanor. [LB142]

COREY O'BRIEN: That is correct. [LB142]

SENATOR CHAMBERS: Then when we go to page 3, subsection (5), enticement is a Class IV felony. [LB142]

COREY O'BRIEN: That is correct. [LB142]

SENATOR CHAMBERS: Why is it a higher grade offense to entice than it is to intimidate? [LB142]

COREY O'BRIEN: The rationale between the differentiation of the penalty was the intimidation by telephone call is the crime that is specified in subdivision (1) of the statute. That would pertain to adult-to-adult conduct more times than not. It could apply to adult and children situations. [LB142]

SENATOR CHAMBERS: And the elements involve terror, intimidation, and threats. You don't consider that serious? [LB142]

COREY O'BRIEN: We do. The reason why we did not make that a felony is because we already have an existing terroristic threat statute that we believe that a lot of that activity would be covered under. We wanted to give prosecutors the opportunity to have some lesser charge when it may not rise to the level of a terroristic threat or it was accomplished by some of the means that we specified in terms of why we designated this just a misdemeanor. [LB142]

SENATOR CHAMBERS: But if the elements can overlap then I, if I'm charged with terroristic threats, I say I have a right to be charged under this lesser offense. I have a

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right. Why should we have the elements overlapping and the prosecutor can either charge a misdemeanor or a felony? It should be one or the other in my opinion. [LB142]

COREY O'BRIEN: Well, I'm not sure that they automatically do overlap. There are certain situations that we would have intimidation that may not rise to the level of a terroristic threat. There are some situations where this might be a lesser included offense of the original felony for a terroristic threat once you go to trial. [LB142]

SENATOR CHAMBERS: What is a terroristic threat so I have an example of what kind of words would be used to convey a terroristic threat? [LB142]

COREY O'BRIEN: Usually a terroristic threat would be prosecutable or something that we would charge on a day-in-day-out basis would be a one-on-one conversation that I would have with someone where I say, I'm going to kill you. [LB142]

SENATOR CHAMBERS: Okay. [LB142]

COREY O'BRIEN: There are other situations, though, where if I simply do an act such as point a gun at you, that could be considered a terroristic threat that may not actually fall under the intimidation by phone. [LB142]

SENATOR CHAMBERS: But we're talking about by phone. [LB142]

COREY O'BRIEN: Right. [LB142]

SENATOR CHAMBERS: I want them...whatever is being conveyed, I want it to be conveyed the same way, not conduct. We're talking here about sounds, visual depictions, not actual interrelationship or interfacing between the two persons in person. So the terroristic threat could be conveyed by telephone. The threat in this bill could be conveyed by telephone and the threat could be, I'm going to kill you. But the prosecutor could charge a terroristic threat or a mere intimidation by telephone which includes a threat. Threat is involved in both of them. There's nothing that says the threat has to be to take somebody's life or inflict great bodily harm. Or is that in the terroristic threat statute? [LB142]

COREY O'BRIEN: Usually it has to be...you have to threaten a crime of violence under the terroristic threat statute. [LB142]

SENATOR CHAMBERS: And give me a threat that doesn't involve a crime of violence. You mean you're going to...because you have something that talks about extorting money. [LB142]

COREY O'BRIEN: I'm going to take your kids away from you. [LB142]

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SENATOR CHAMBERS: That wouldn't be a terroristic threat then, would it? [LB142]

COREY O'BRIEN: No, sir. That certainly would be harassing or intimidating depending on the circumstances under which it was said. [LB142]

SENATOR CHAMBERS: And it would be a Class I misdemeanor if I threaten to take your children from you. [LB142]

COREY O'BRIEN: It could be depending on the circumstances under which it was said. [LB142]

SENATOR CHAMBERS: If I said I'm going to hit you upside the head with a hammer, is that a terroristic threat or just a threat? [LB142]

COREY O'BRIEN: It could be. It all depends again as a prosecutor for when I'm looking at this, I'm looking at it as what was the context under which it was said? You know, if we said it in a joking manner, things like that, that would all be things that I took into consideration; the nature of the relationship. It may actually not rise to the level of being a terroristic threat. [LB142]

SENATOR CHAMBERS: Okay. This is an example. I'm going to kill you or I'm going to kill you (changes inflection in voice). I'm going to kill you sounds like somebody who might live around the corner from you. If it's I'm going to kill you (changes inflection in voice), maybe that's somebody on the other side of the world. And there could be a predisposition to have a far more negative attitude towards somebody who might be Middle Eastern than there is somebody in mid Omaha. So rather than the content of the threat or the likelihood or ability to carry it out, it could be that there is a much greater propensity to charge somebody of a certain race, ethnicity, or national origin with a harsh or high level of offense than somebody who is white like a Timothy McVey, all-American, clean cut, and he blew up a building and killed all those people. Somebody else might be dark skinned, appear to the observer to be from one of the Middle Eastern countries, and that person is subjected to a lot more without having done anything other than look a certain way than Timothy McVey. And McVey is the one who did the bombing. Now I said all that to try to get at how you all determine who will be charged with a terroristic threat and who...which could be a felony, or who with a mere threat, which would be a misdemeanor, and I'm not sure that I see, but I think you probably have told me as much as you could by way of distinction. [LB142]

COREY O'BRIEN: And I will tell you that myself personally, any of those factors that you mentioned would never be considered by myself and I would hope by no other prosecutors. [LB142]

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SENATOR CHAMBERS: Never be considered by yourself. [LB142]

COREY O'BRIEN: No, sir. [LB142]

SENATOR CHAMBERS: Would they be considered by you if you were with somebody else? [LB142]

COREY O'BRIEN: No, sir. [LB142]

SENATOR CHAMBERS: In other words, you were not by yourself, okay. But it might be considered by the person with whom you were. [LB142]

COREY O'BRIEN: I would hope not. [LB142]

SENATOR CHAMBERS: But others might consider these things. [LB142]

COREY O'BRIEN: I wouldn't work with them anymore if they would. [LB142]

SENATOR CHAMBERS: Yet you still work in the Attorney General's office? You don't have to even answer that. That's all I have, though, thank you. [LB142]

COREY O'BRIEN: Thank you, Senator. [LB142]

SENATOR ASHFORD: Just so I understand this, just to clarify what Senator Chambers was asking, I think I understand the point as it relates to terrorism. I understand that. But when we're talking about, and you mentioned something about in the context of how these words are used and that's a determining factor which I absolutely agree with you about. But it's discretionary with the prosecutor to decide the context is relevant or not. I worry a little bit about again adults...contacts between adults on the Internet that are...the line "visual depiction of sexually explicit conduct" and so forth and so on, I realize that it's in the statute now as it relates to telephone calls. And what we're expanding that to is...and it's discretionary with the prosecutor depending upon what the context of these messages are, I understand that point. But when does it, you know, when you're talking about activity between adults, it can become real fuzzy and it's (inaudible). [LB142]

COREY O'BRIEN: Are we talking about the sexually explicit conduct? [LB142]

SENATOR ASHFORD: You know, I'm just going on page 1, Section...I'm sorry I didn't tell you, Section...in the amendment on Section, what was section (b) or subparagraph (2) on page 1 of the amendments. Contacts...this is an adult contacting another adult by computer transmitting indecent, lewd, lascivious, obscene language or any writing sound on the Internet. And if that's sent, you know, it's just worrisome. You have two

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adults that may have a relationship where this is not bothersome, and then the relationship becomes bothersome and so then all of a sudden these become a misdemeanor. [LB142]

COREY O'BRIEN: And that is one of the key reasons why the amendment sought to take out the words "annoy and offend" because it simply had to be something that harasses them or threatens them or terrifies them. And we didn't want to create any illusions that we were talking about incidents where people are sending jokes back and forth to one another. And we thought that that was definitely something that...and that "annoy and offend" language was in the original telephone harassment... [LB142]

SENATOR ASHFORD: Is that in the language now? [LB142]

COREY O'BRIEN: It is in the original statute. And when we looked at this we said, you know what? That's probably unconstitutional because it's very overbroad in terms of what annoys and defends one person may not necessarily annoy and offend another. [LB142]

SENATOR ASHFORD: Or suggests any indecent, lewd, or lascivious act. [LB142]

COREY O'BRIEN: Right. That's why it has to be sent with that intent to terrify, intimidate, threaten, or harass. [LB142]

SENATOR ASHFORD: Okay. In sub (1)(a). [LB142]

COREY O'BRIEN: Subset (1)(a). And when they are sending the pictures that absolutely disgusts somebody, regardless of whether it's...it has to be sent with that intent. We're not just going after people that jokingly send pictures of nudity to one another trying to... [LB142]

SENATOR ASHFORD: My guess is that's a fairly... [LB142]

COREY O'BRIEN: ...trying to get their buddy in trouble at work or something at the office and that's not what we're after. [LB142]

SENATOR ASHFORD: Okay, thank you. Any other questions? [LB142]

SENATOR CHAMBERS: Just one. Tailgating on what Senator Ashford asked you, the word "harass" is still in line 8. And the scenario that Senator Ashford mentioned where two people were getting along and they had a falling out and maybe they were sending explicit sexual conduct depictions which would not terrify anybody, but that word "harass" could be used. And the one party, because he or she is angry at the other, can say, well, yeah we sent these things to each other but I don't like it and it harasses me

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now. Then if the prosecutor likes the one who is bringing the charge, perhaps the charge will be filed. If the prosecutor likes the one against whom the charge is sought, then the prosecutor won't file the charge. If we remove the word "harass," what problem would that create because you are expanding the means by which this crime can be committed? [LB142]

COREY O'BRIEN: And I don't want to create and I don't think the Attorney General wants to create any issues with regard to any ambiguities that this would cause. As far as I'm concerned, I don't think that it would cause any problems as to what the design of the statute is to remove the language "harass." That again is what might be harassing to one person may not be necessarily harassing to another. And I can certainly understand and appreciate that point. So as far as I'm concerned, I don't believe it would cause any great damage to what the statute is designed to do. [LB142]

SENATOR CHAMBERS: If "harass" were taken out. [LB142]

COREY O'BRIEN: Yes, sir. [LB142]

SENATOR CHAMBERS: And I'm looking again at the increased numbers of ways this can be done. I have to ask you this. Is the definition of "electronic communication device" on page 3 designed to include a telephone? [LB142]

COREY O'BRIEN: Potentially, yes. It depends on the capacity with which the telephone is being used. It could be a telephone that's used for text messaging purposes and that's why I wrote it the way I did. [LB142]

SENATOR CHAMBERS: If you did not use telephone, you would lose something even though you have this broad definition of electronic communication device? How would this definition...what is there about a telephone use for text messaging purposes that would exclude it from the definition of electronic communication device? [LB142]

COREY O'BRIEN: Some text messaging services are not sent over a traditional phone line. And so the argument could be made that it is more wire-based or electronically based as opposed to your traditional telephone. So that's why we wanted to be all inclusive. Also we wanted to be thinking forward in terms of what technologies may come forward in the future. So that's why we gave a definition the way that we did. [LB142]

SENATOR CHAMBERS: What kind of device is electromagnetic that they have in mind in line 10? [LB142]

COREY O'BRIEN: It could be considered some type of computer hardware from time to time. It could be considered electromagnetic. Photoelectric or electromagnetic also

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could be cameras of some sort or another. [LB142]

SENATOR CHAMBERS: Radio here is not the same as telephone? [LB142]

COREY O'BRIEN: Radio has to deal with the transmission, the way that it's transmitted. It's sent over airwaves as opposed to by wires. [LB142]

SENATOR CHAMBERS: A telephone uses wire, is that what you have in mind, a telephone? [LB142]

COREY O'BRIEN: A traditional telephone that you would have in your house connected to a land line would normally be connected by wire, yes. [LB142]

SENATOR CHAMBERS: And that would...so the term wire would include telephone. [LB142]

COREY O'BRIEN: In the traditional sense. [LB142]

SENATOR CHAMBERS: So we don't need to have an offense by telephone as such since you have this broad definition of electronic communication device? When you talk on the telephone, is the voice, the sound you made, changed to electrical impulses that go through the wire, then the receiving mechanism reassembles it into a sound that is audible and you understand it as words? So why do you need to have these specific references to telephone? I'm curious. Is that redundant in view of the...okay, let's go over so I can make this example then I'll leave you alone. Page 2... [LB142]

COREY O'BRIEN: You're fine, Senator. [LB142]

SENATOR CHAMBERS: Okay. Starting in line 22, "Intimidation by telephone call or enticement by telephone call" is restricted to the telephone. Why have a specific offense done by telephone when this electronic communication...suppose you said, "Intimidation by electronic communication device means" and you don't make a reference to telephone. I'm trying to find out if electronic communication device is somehow different from telephone. And if it's not, why is telephone even retained at all? [LB142]

COREY O'BRIEN: I guess your question the way I take it is, is when we included the electronic communication device in there, do we also include telephone per se? [LB142]

SENATOR CHAMBERS: And you said you do because wire would include it and radio would include those that don't use a wire because radio waves would go through the air. I'll be thinking about it though, but I wanted to get your thinking on it. [LB142]

O'BRIEN: I think there probably is an all-inclusive definition. But at the same time, I

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didn't want to tinker with the traditional notion of how everyone thinks about telephones. I didn't want to tinker with the statute as it currently resides in that way in terms of drastically taking it and replacing it universally with electronic communication device. I think arguably electronic communication device could also mean computer, yet we define that separately as well. [LB142]

SENATOR CHAMBERS: So in the definition they could just put telephone, couldn't they? [LB142]

COREY O'BRIEN: In some point, yes. [LB142]

SENATOR CHAMBERS: Electronic communication device, you could say for the purposes of this act or whatever it is, electronic communication device means and then you can put anything in there you want to. You can put the word telephone. Okay. [LB142]

COREY O'BRIEN: We could put telephone. We could put computer in there if we so chose. [LB142]

SENATOR CHAMBERS: Okay, that's all I would have. Thank you. [LB142]

COREY O'BRIEN: Thank you. [LB142]

SENATOR ASHFORD: Senator Pirsch. [LB142]

SENATOR PIRSCH: I just guess in following up with the discussion regarding eliminating the word "harass" from the Section 1, currently given a fact pattern of, say there's a split in a relationship, woman goes to work and it's not uncommon that there will be cases...let me ask, is it not uncommon after splits that you do see harassment via the telephone in cases like that? [LB142]

COREY O'BRIEN: We do. [LB142]

SENATOR PIRSCH: And with that fact scenario over the course of the day an individual may call 50 or 60 times, expressly with the purpose of expressly stating to harass that individual and to perhaps get them in trouble with the employer? [LB142]

COREY O'BRIEN: Correct. And the only reason I relented on that point, Senator, about would harassment be...would change this bill materially, I believe that terrify, intimidate, threaten could also be...define the behavior that you're mentioning in your scenario that the husband is trying to do that to intimidate her or threaten her in some way. I don't know necessarily that it's just simply harassment and nothing more so that's why I said what I did there. [LB142]

SENATOR PIRSCH: Are there other measures or other laws to your knowledge that would form some sort of legal protection against that type of activity? You said that the interpretation of threaten, I'm sorry, terrify, intimidate or threaten could be...could possibly work in certain circumstances. Is there any other type of statute that would work in those type of situations? [LB142]

COREY O'BRIEN: Certainly in the domestic situations you're talking about, protection order violations or if there was a protection order, allowing them to get a protection order for harassment. Sometimes it may actually be third-degree assault might actually fit under some of those definitions as well. [LB142]

SENATOR PIRSCH: What about in the cases where they say, you know, nothing, I'm going to kill you or anything expressly threatening... [LB142]

COREY O'BRIEN: Oh, terroristic threats. [LB142]

SENATOR PIRSCH: ...by just of I'm not going away and I'm going to keep calling you and your life is going to be miserable until you realize it's time to come back, that over and over 60, 70, 80 times a day. In your estimation, would that be affect that type of activity by lessening, by dropping off the word or would the other words in your estimation be...give coverage of that type of situation? [LB142]

COREY O'BRIEN: I believe they would give coverage. I understand that, you know, I never like to take anything out of an existing statute, but if it can be covered by other words in the statute, I don't believe it would do serious damage to what the purpose of the statute is. [LB142]

SENATOR PIRSCH: Okay, thank you. [LB142]

SENATOR ASHFORD: Anyone over here? No. Senator Chambers. [LB142]

SENATOR CHAMBERS: This is Senator Pirsch's fault, but I'm glad he brought up the discussion because what I was looking at is the notion that we're talking here about the offense of intimidation. And I think intimidation is different from harassment so we could have the words threat...the intent to terrify, intimidate, or threaten as the offense of intimidation. Then in another subsection cover what Senator Pirsch is talking about so that we do not indicate that simple harassment is the same as intimidation because a person could, in fact, be annoyed and offended without being intimidated at all. So since the name of the offense is intimidation, I would rather we stick to the kind of words that would create that frame of mind in the person or is designed to create that frame of mind. And then if it is this kind of harassment that Senator Pirsch is talking about, we could fashion a subsection that would relate to that activity because it may not

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intimidate at all. It could just be annoying. And I agree with him--that is a terrible thing to be confronting, but I'd rather it be named an offense that more closely defines what it is instead of saying that it necessarily intimidates. So we might can do something and retain the offense of harassing somebody without calling it intimidation. [LB142]

COREY O'BRIEN: And certainly, I don't want to speak for Senator Friend, but I would invite the opportunity to work on something like that with you. [LB142]

SENATOR CHAMBERS: Okay. [LB142]

SENATOR ASHFORD: One other question. Is it absolutely necessary, following on with your answers to my questions before, that prima facie, I know that's existing language, but prima facie appear in line 6 on page 2 because it's not, is it? Prima facie can go away. [LB142]

COREY O'BRIEN: I don't believe it is. Senator Ashford, as you well know that what a statute tells a judge is prima facie evidence means very little. [LB142]

SENATOR ASHFORD: Right. [LB142]

COREY O'BRIEN: That's up to the judge to determine what prima facie evidence is. [LB142]

SENATOR ASHFORD: And I appreciate that. I think we're sort of cleaning up the whole thing through this process and so it would be appropriate to take that out so. Okay, thanks, Corey. [LB142]

COREY O'BRIEN: Thank you. [LB142]

SENATOR ASHFORD: Good afternoon. [LB142]

ROBERT LAUSTEN: Good afternoon, Mr. Chairman, senators of the Judiciary Committee. My name is Bob Lausten. I'm the chief of police in LaVista and I'm here on behalf of our community. LaVista Police Department is a host member of the Internet Crimes Against Children Task Force made up of several agencies in Sarpy and Douglas Counties. Our officers go on line posing as children in nonadult-type chat rooms and are almost instantaneously contacted by web users seeking to talk about sex. The contact usually begins with the person asking the pseudochild, which I refer to as our officer who is undercover, for their ASL, which means age, sex, and location. Our officers respond with an age under 16, many times 13 or 14 years of age. That response should send a red flag to someone looking for sex or sexual discussions that the person on the other end is a child. We know, however, that's not the case. The chat many times turns sexual. To be descriptive enough for this committee, it makes the old 976 phone sex

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numbers seem like they're rated PG. The things that predators convey over the chat are extremely graphic. Again, the predator believes that they're talking to a child. Predators transmit their web cams showing themselves naked and masturbating during the chat. Again, it's believed by the predator that they're talking to a child. The predators will make arrangements to meet the pseudochild expecting to meet for sex. Our officers will observe a predator and make the arrest for sexual assault use of a computer which we thank the Unicameral for passing in 2003. That states that no person by means of a computer shall entice a child under 16 or a peace officer who is believed to be under 16 to engage in sexual acts. Through investigation, we identify where the suspect was on-line, we get a search warrant for the computer that was used. I can honestly say that every time the ICAC officers go on-line they're solicited for sex or they're exposed to sexually graphic material, the same images again that our children are seeing. Many times, however, we're unable to follow through with our on-line investigations when the suspects do not try to meet the pseudochild. They've been on-line and they've exhibited the graphic sexual behavior to someone they believe is a child, we can't do anything about that right now. LB142 will assist in our efforts to remove these predators from the Internet. We have predators take digital photos of underage children at tanning salons. We've been able to forensically recover the deleted images off of cell phones with camera phones, off of digital cameras that people have, and also their computer. Camera phones have taken the instantaneous distribution of the graphic material to a different level right now. As technology advances, so does the need for our laws to reflect the same. Timely enough, I received a telephone call from a parent last night who stated that her now 16-year-old daughter has been corresponding with a 30-year-old man from Oregon via e-mail and instant messenger in the past year. The lady is worried the man is trying to groom her daughter into meeting her and leaving Omaha and meeting this guy out in Oregon. I explained to her our limitations we have in our current law right now that we really can't do anything about that. Her child is 16 years of age. If this happened when she was 15 and we had LB142, we probably could have done something about it legally. As previously mentioned in the previous testimony, this is more than a bill just to protect children. I think the Attorney General's office has covered the part about enticement and harassment with the telephone calls. I think we're obligated to Nebraskans to provide a safe and secure and environment when they're on the Internet and I'd like to thank you for your consideration of this bill. [LB142]

SENATOR ASHFORD: Thank you, Robert. Any questions? Thank you, sir. How many proponents again, I'm sorry, do we have? [LB142]

JEREMY KINSEY: I believe I'm the last, sir. [LB142]

SENATOR ASHFORD: Okay. Thank you. [LB142]

JEREMY KINSEY: Mr. Chairman and senators of the Judiciary Committee, good

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afternoon. My name is Jeremy Kinsey, J-e-r-e-m-y K-i-n-s-e-y. I'm a sergeant with the LaVista Police Department. I'm also here on behalf of the Nebraska Fraternal Order of Police. I'm an executive board member with the state lodge. I am the supervising detective in charge of the criminal investigations bureau. One of my functions of that assignment is the coordinating of the multijurisdictional Internet Crimes Against Children Task Force and you've heard ICAC being referred. Routinely, officers from neighboring local and federal police agencies meet at the LaVista Police Department where we create on-line profiles and go on-line posing as underage juveniles. During these investigations, we enter Internet chat rooms and are contacted immediately by, in most cases, adult male sexual predators. During these contacts, we are routinely solicited for some sort of sexual activities. Many times these contacts turn into cases where the adult predator takes the next step and makes arrangements to meet with an underage juvenile. In most cases, the chat leading up to the prospective contacts doesn't take long to turn sexually explicit. In a number of these cases, the chat that is transmitted is coupled with a request for the predator to see or send pictures, pornographic movies, or live web cams. In most of these incidents, the predator will often offer to send me, the underage juvenile, pictures of their genitals. And a trend that is increasingly disturbing, is the adult predator will go live with the web cam and show their genitals and even masturbate. In a number of state, there are laws on the books with real teeth to be able to prosecute these offenders. Unfortunately, if the on-line contact with these offenders end with no meeting with the police, there are few avenues to go after these monsters. LB142 will add more tools for the belts of law officers that diligently try to put these criminals behind bars. An additional benefit of the bill is adding a prohibition of using cellular phones and other electronic messaging devices to threaten victims. Recently, my unit investigated a case where a woman was sexually assaulted. During the investigation, the offender and the associates of the offender sent threatening e-mails and cellular phone text messages to the victim. Under current law, the offenders who are adding the cycle of violence to the victim walk away with a ticket and a court date and the victim goes on hurting. LB142 gives us the ability to arrest the offender for a felony charge, put the offender in jail and put the victim at ease. As an officer who is on the front line of fighting for our children and victims of crimes, LB142 helps make my job easier. On behalf of the LaVista Police Department and the State Fraternal Order of Police, I urge you to support the Attorney General and this bill. Thank you for your time. [LB142]

SENATOR ASHFORD: Thank you, Jeremy. Do we have any questions of Jeremy?  
Thank you, sir. [LB142]

JEREMY KINSEY: Thank you. [LB142]

SENATOR ASHFORD: Any opponents? Neutral? Senator Friend. [LB142]

SENATOR FRIEND: Thank you, Chairman Ashford. And members of the committee,

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again, really quickly, I think all of you that know me know that I don't say this very often. I think this is pretty important legislation. I do want to see it passed, but doesn't mean you're going to do anything with it. But I don't say that that often. And I think not just because the Attorney General and I have worked, their office and I have worked on this, but I think that it goes to what some of the folks have said and the line of questioning that was going on here. The Judiciary Committee deals with criminal code. It's not as much of an art as it is a science. And I think we, as that science relates to this area of law, we've got predators that are updating. We've got criminals that are updating the way they perform their crimes. And I think that we have statutes that are somewhat antiquated. So I think if we have the opportunity to fix some of that it would be nice if we did. [LB142]

SENATOR ASHFORD: I think that's...the questions were kind of leading in that direction, Senator Friend. [LB142]

SENATOR FRIEND: Yes. [LB142]

SENATOR ASHFORD: So I appreciate you bringing the bill. Thank you. [LB142]

SENATOR FRIEND: Thank you. [LB142]

SENATOR SCHIMEK: Mr. Chairman. [LB142]

SENATOR ASHFORD: Oh, Senator Schimek. [LB142]

SENATOR SCHIMEK: Don't misunderstand this question. Thank you, Senator Friend, but would you put this in a higher importance level than your bicameral legislature bill? (Laughter) [LB142]

SENATOR ASHFORD: Yes would be the answer that we're looking for. [LB142]

SENATOR FRIEND: I'm waiting for the laughter to die down. Absolutely. [LB142]

SENATOR ASHFORD: Yeah, okay. Good man, Senator Friend. [LB142]

SENATOR FRIEND: And that's honest, absolutely. [LB142]

SENATOR ASHFORD: I believe you. I believe you. Thank you. [LB142]

SENATOR FRIEND: Thank you. [LB142]

SENATOR ASHFORD: Senator Johnson. [LB142 LB246]

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SENATOR JOHNSON: Yes, sir. [LB246]

SENATOR ASHFORD: Good afternoon. [LB246]

SENATOR JOHNSON: Thank you. [LB246]

SENATOR ASHFORD: Let's see, LB...where are we? [LB246]

SENATOR JOHNSON: LB246, I believe. [LB246]

SENATOR ASHFORD: LB246. How many testifiers do we have on LB246? Okay, thank you. Proceed, Senator Johnson. Thank you. [LB246]

SENATOR JOHNSON: (Exhibit 7) You bet. Thank you. Senator Ashford, members of the Judiciary Committee, I come before you today for really what I think is something very, very significant. It will not be long before up on the floor we are going to talk about the future of the death penalty in the state of Nebraska. We execute someone...I think the last execution in this state was some nine or ten years ago. And it is something that is done rarely. What I'm coming to you about today is something that happens all too often, and what it is is this, is that we have people who are in need of live-saving organs that are denied this chance for their life to continue because of problems in securing these organs. Many times the families of the donors are perfectly willing to donate the organs of their relatives, but there have become legal obstacles in the way of this happening. So it isn't unusual for this to happen, and what this legislation is about is an attempt to make the process easier. We still must make sure that we--in cases where there is the preservation of evidence that's needed and so on--that we still do that. So to just show you the significance of this, right now in the United States there are 95,000 people on waiting lists for organ transplants. Now here's another little interesting statistic. Eighteen people die everyday waiting for an organ in the United States. Nebraska isn't a whole lot different. We've got over 500 people waiting for organ donations in Nebraska. I've had a few friends that couldn't wait that long. Now here's the thing. Many lifesaving transplant organs cannot be recovered from the potential donors in the time frame needed to transplant these organs. And so that this is really the crux of the problem is can we, with this legislation, expedite the process to accomplish this. In addition, LB246, in addition to the statute setting forth the duties for county coroners, the bill is intended to facilitate the recovery of these transplantable organs from the descendants under the coroner's jurisdiction. Just a couple more points here. LB246 would require coroners or their physicians or designees to complete in a timely investigation to determine whether any transplantable organs or tissues contain evidence of the proximate cause of death. And one last thing. Additionally, the coroners will be able to deny the recovery of any organs or tissues containing evidence of the proximate cause or means of death, thereby maintaining a balance between the availability of organs and tissues for transplantation and the orderly administration of

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justice. One thing that we have tried doing is working with the various organizations, and in connection with this there is an amendment that was drawn up in cooperation with the Nebraska Trial Lawyers Association. [LB246]

SENATOR ASHFORD: Thank you, Senator Johnson. Yes, Senator Schimek. [LB246]

SENATOR SCHIMEK: Thank you, Mr. Chairman. Welcome, Senator Johnson. I would like to have you look at page 3 of the bill. You may not even have to do this to tell me the answer to it, but on line 12 and 13 it says that the coroners or the coroner's physician has to complete this preliminary investigation and then these are the words I have a question about--within a time period compatible with preservation of the organ or tissue. Is that time frame going to be different for different organs or tissues? [LB246]

SENATOR JOHNSON: Oh, to some extent, but obviously one of the things that you're going to do is that when organs are transplanted there, you know, are usually many organs donated by the same person. And so there are some, shall we say, that are more critical than others. And so corneal transplants and stuff like this would have a different time line than livers or some other organ like that. So that's the problem there. And I guess the other thing is this, is what we're really after is to make sure that the process is expedited so that when the donor of the organs--let's say if this occurs at 3:00 in the morning--that we don't get caught up in the bureaucracy and wait until 8:00 the next day to make the decision. [LB246]

SENATOR SCHIMEK: I understand the purpose, but I'm trying to understand what's the shortest time frame that we're talking about here? [LB246]

SENATOR JOHNSON: I think that we're, you know, in most of the cases that I've personally been associated with, these are kind of anticipated deaths of these people. It isn't that they're very short on time. I may be misinterpreting what you're saying, Senator Schimek. [LB246]

SENATOR SCHIMEK: Well, it wouldn't be in the case of an automobile accident, for instance. That would be totally unanticipated. What I'm trying to figure out here is if later in the bill that says if they complied with this they'll be immune from similar criminal liability, etcetera. I'm trying to figure out how fast this autopsy has to be done under this bill. [LB246]

SENATOR JOHNSON: I guess I don't know how to answer that in a, you know, in a...again just from the framework, and perhaps other people behind me can give you a more specific answer, but there usually is an anticipation of this going to take place. And so we're really talking, you know, starting the process in place before the person is, you know, legally pronounced dead or whatever. So it's a process ahead of time that we're interested in doing. So to make a smooth transition I guess might be a better word.

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[LB246]

SENATOR SCHIMEK: Okay, thank you. [LB246]

SENATOR ASHFORD: Yes, Senator Pedersen. [LB246]

SENATOR PEDERSEN: Thank you. Dr. Johnson, when we talk about coroners we're talking about the person is already dead. Are they retrieving anything besides the eye and some skin tissue that I do know they use from cadavers. I did not know that they used any other organs that they could take from a cadaver. Are they now trying to use organs? [LB246]

SENATOR JOHNSON: Well, and again, that's when I go back to the process that we're talking about. You're absolutely right in that skin, for instance, can be taken after the person is dead. The other organs are so dependent on their blood supply that, you know, we've always used the term that a person's brain will be dead in eight minutes from the time that their heart stops beating and this type of thing from the circulation of the blood. But many of these people are going to be on life support systems and stuff like this in an attempt to... [LB246]

SENATOR PEDERSEN: Well, if they're on...stop there, Doctor. [LB246]

SENATOR JOHNSON: Sure. [LB246]

SENATOR PEDERSEN: If they're on that then they aren't with a coroner. I mean, once they hit a coroner they're in a morgue somewhere on the table and they've probably been dead for a few hours by the time the services get him. Are they not? I mean, I'm just wondering why we are doing this for coroners and we're not doing it for those doctors who specialize in retrieval of organs. And if you have a car accident and you're in the emergency room, obviously, and you know... [LB246]

SENATOR JOHNSON: Well, Senator Pedersen, I think what we're trying to say is that there are going to be coroner's cases or anticipation of coroner's cases. Let's just say, for instance, that the potential donor had a gunshot wound to the head. He may have very good lungs, liver, kidneys, and so on, and that it would be possible in consultation with the coroner ahead of time that he would then say that none of these other organs were the cause of the person's death in a court of law. Otherwise, you could have a situation where if you remove the person's heart for a donation then we would be in a situation where at least potentially you could say, well, the person would not have died if you hadn't removed his heart. So I think it's a working together... [LB246]

SENATOR PEDERSEN: So would this mean that we have to bring the coroner to the hospital and say this person is going to die anyway? [LB246]

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SENATOR JOHNSON: I think what we say here is that there are other designees as well as the coroner that could assist in this procedure. [LB246]

SENATOR PEDERSEN: Interesting. Thank you. [LB246]

SENATOR JOHNSON: You bet. [LB246]

SENATOR ASHFORD: Senator Pirsch, did you have any questions on this? [LB246]

SENATOR PIRSCH: Well, I might be. I'll defer to Senator McDonald. [LB246]

SENATOR ASHFORD: Senator McDonald. [LB246]

SENATOR McDONALD: Other states doing this? Tell me if you researched this. Is this a problem in other states and how are they correcting it? [LB246]

SENATOR JOHNSON: Yes. It has been a problem in other states. And what we have here is this bill has been crafted in connection with how other states have solved the problem. And behind me you are going to hear from a representative of one of the other states that basically have done this and how well it's functioning there. [LB246]

SENATOR McDONALD: Do you know how many transplants like the Med Center would do in a day? [LB246]

SENATOR JOHNSON: A day isn't an accurate number. [LB246]

SENATOR McDONALD: Week? Month? [LB246]

SENATOR JOHNSON: But I think that, if I recall correctly, it's been some time since I've seen the figure, but it was estimated I think that there were about a hundred organs a year that we might miss out on at the present time. So a hundred organs a year as we started out with were very concerned about executing one person when it's once every 10 years. Here we're talking, you know, 100 people a year that would potentially be saved. [LB246]

SENATOR ASHFORD: Thank you, Senator. I'm sorry. I was engaged in discussions. Who's first? Senator Schimek. [LB246]

SENATOR SCHIMEK: Senator Johnson, I think I...maybe my first questions were a little bit off target, because we're not talking about the autopsy here. [LB246]

SENATOR JOHNSON: No. [LB246]

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SENATOR SCHIMEK: We're talking about the preliminary investigation. [LB246]

SENATOR JOHNSON: Yes, yes. [LB246]

SENATOR SCHIMEK: And that simply is, as the bill mentions, a look at all the tests and x-rays and so forth. [LB246]

SENATOR JOHNSON: Again, and I was trying to pick a simple example of the gunshot wound to the head. Obviously there would be other ones that would be more complicated than that. But that's just an example of what might delay the obvious use of these organs that someone could benefit from. [LB246]

SENATOR SCHIMEK: What if a coroner...well, if a coroner can't tell for sure... [LB246]

SENATOR JOHNSON: Then I think he has to make the ruling. [LB246]

SENATOR SCHIMEK: Then he can't make the release. [LB246]

SENATOR JOHNSON: Then I think... [LB246]

SENATOR SCHIMEK: What if he makes a mistake? [LB246]

SENATOR JOHNSON: Well, I guess we're all susceptible to mistakes, but you know, I guess I would think just from that standpoint that might hurt their case in court theoretically. So I guess that rare instance would have to be balanced with the potential of enumerable lifesaving organ transplants. So certainly it would be possible and hurt their legal case, but this is an attempt to balance those two systems. [LB246]

SENATOR SCHIMEK: Thank you. [LB246]

SENATOR ASHFORD: Senator Pirsch. [LB246]

SENATOR PIRSCH: Can you give me--and I apologize for not having the background on this (inaudible) emergency medical care--but could you give me kind of a common fact scenario or case where currently we're missing that? Where this bill would play a role in? [LB246]

SENATOR JOHNSON: You know, it could be any number of things from what we are talking about, from the standpoint of the gunshot wound to the head or whatever, but it might be just the lack of coordination between the legal officials to, you know, get there at 3:00 in the morning. And as I understand there's been a few of those cases. [LB246]

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SENATOR PIRSCH: Would that typically take place in the setting of a hospital or a residence or maybe would the gunshot to the head...is that? [LB246]

SENATOR JOHNSON: No, even if the person did have the gunshot wound to the head he'd be taken to the hospital and, you know, attempt to save his life and so on. But when that would become hopeless, why then the decisions would have to be made and this process would be put in place. [LB246]

SENATOR PIRSCH: So typically the preliminary investigations would take place in the context maybe of a hospital. That's not unusual. [LB246]

SENATOR JOHNSON: I think...virtually always, I'd say. [LB246]

SENATOR PIRSCH: Okay. And what seems to be the problem as it exists now that...right now the coroner is charged with the duty right now of completing a preliminary investigation, correct? [LB246]

SENATOR JOHNSON: But I guess what we're talking about here is in a timely fashion is one of the problems, as an example. [LB246]

SENATOR PIRSCH: So that doesn't tend to be happening in a significant portion of the case. [LB246]

SENATOR JOHNSON: For numerous reasons. And so this is an attempt to make a smoother process so that we don't lose these potential lifesaving organs. [LB246]

SENATOR PIRSCH: And do you think by utilizing the words or I guess maybe even telling me through experiences in other states if they've utilized words, and you do this by requiring the coroner shall complete the investigation as soon as possible, because that's not a hard...obviously encompasses the totality of the circumstances that exist. But have other states' experiences been that those type of activities then are processed, you know, in a more expeditious manner. [LB246]

SENATOR JOHNSON: I believe that's the case, sir. And that the, you know...it would seem reasonable other states would have the same kind of problems that we would. And as I mentioned, I believe there is someone here today from another state that they've been through this before and can comment more accurately the success or not. [LB246]

SENATOR PIRSCH: Okay. Very good, thank you. [LB246]

SENATOR ASHFORD: Thank you, Senator Johnson. Senator Chambers. [LB246]

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SENATOR CHAMBERS: I have just a couple of questions, Dr. Johnson--Senator Johnson. When Charles Dickens was writing A Christmas Carol very near to the beginning it said Marley was dead. So this person is dead. [LB246]

SENATOR JOHNSON: When the process would start, Senator Chambers, as I think in anticipation of death, once the person is dead, and you know, we go more than a few minutes from when their heart is circulating the blood through these organs, the organs become useless. [LB246]

SENATOR CHAMBERS: Okay. And I'm taking it step by step so I can have the whole process... [LB246]

SENATOR JOHNSON: Sure. [LB246]

SENATOR CHAMBERS: ...during my conversation with you, rather than what you may have said in response to other questions or in your opening. Now I'm on page 3 looking at subsection (c), which starts at line 10. If the coroner fails to complete the preliminary investigation or fails to designate the coroner's physician or another physician to complete the preliminary investigation within a reasonable time period compatible with the preservation of the organ or tissue for the purpose of transplantation or declines to conduct the preliminary investigation. The organ or tissue shall be recovered as though the donor was not within the coroner's jurisdiction, which means it might be recovered before the person is actually dead? [LB246]

SENATOR JOHNSON: Well, in a sense virtually all organs are recovered before they're dead. [LB246]

SENATOR CHAMBERS: I'm talking about the person. [LB246]

SENATOR JOHNSON: Yes, but the exception as what we talked about with Senator Pedersen over here is there are tissues like skin that can be removed after the person is dead and that tissue will last longer. [LB246]

SENATOR CHAMBERS: But that's not what I'm asking. [LB246]

SENATOR JOHNSON: I guess I don't quite understand. [LB246]

SENATOR CHAMBERS: When this subsection (c) comes into being, no organ will be removed from any person who is not dead. Is somebody going to pronounce this person dead before they start removing organs? [LB246]

SENATOR JOHNSON: No. [LB246]

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SENATOR CHAMBERS: So this person would still be alive. [LB246]

SENATOR JOHNSON: Well, what you will do is that the person will be under life support. You know, whether it's a ventilator or this type of life prolonging in order so that the heart and lungs function properly. [LB246]

SENATOR CHAMBERS: But that's not in this bill, is it? What you're telling me now about life support and the person being in this condition that you're describing that necessitates life support? That's not in the bill, is it? I'm not being argumentative. I just want you to tell me. [LB246]

SENATOR JOHNSON: Yeah, not...it may well be that it's not spelled out that way and perhaps it should be. [LB246]

SENATOR CHAMBERS: Okay, and since we've concluded that let's move right along, because I don't want to delay you. [LB246]

SENATOR JOHNSON: Sure, sure. [LB246]

SENATOR CHAMBERS: Now we have on page 4 beginning in line 23, and I'll wait for you to catch me. [LB246]

SENATOR JOHNSON: I'm hunting for this copy in here. [LB246]

SENATOR CHAMBERS: Take your time. I hope they won't be hunting for what they're going to do when we're dealing with one of these persons. Okay. [LB246]

SENATOR JOHNSON: All right. Where were you at, sir? [LB246]

SENATOR CHAMBERS: Okay, beginning in line 23 it says... [LB246]

SENATOR JOHNSON: What page, sir? [LB246]

SENATOR CHAMBERS: Four. [LB246]

SENATOR JOHNSON: Okay. [LB246]

SENATOR CHAMBERS: Any coroner, coroner's representative, coroner's physician, or his or her designee, when we say that, a coroner is not a physician in all cases and maybe in none. [LB246]

SENATOR JOHNSON: Correct. [LB246]

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SENATOR CHAMBERS: But a coroner is the one who could do this. A coroner could make a medical decision and investigation without being a medical person, isn't that true? [LB246]

SENATOR JOHNSON: Yes. [LB246]

SENATOR CHAMBERS: Okay, so any coroner, coroner's representative, it doesn't say that representative has to be a medical person either, does it? [LB246]

SENATOR JOHNSON: If the coroner didn't need to be, I don't believe that the designee would have to be. [LB246]

SENATOR CHAMBERS: Okay, then coroner's physician or his or her designee. When they say his or her designee do they mean the coroner's physician? Okay, or is there a designee? The hospital at which the donation took place, personnel of such hospital, authorize recovery personnel or any other person, who would be included in that any other person who is not in this list laid out? Could it be the janitor? [LB246]

SENATOR JOHNSON: It would not seem likely, sir. [LB246]

SENATOR CHAMBERS: Why not? [LB246]

SENATOR JOHNSON: I guess with that wording. But I guess what they're talking about there is, you know, with these type of procedures there are teams of people that... [LB246]

SENATOR CHAMBERS: But I don't want to guess. That's not in the book. That's not in the language. [LB246]

SENATOR JOHNSON: Yes, I agree. [LB246]

SENATOR CHAMBERS: So let me continue because that's not the main thing I'm getting to. [LB246]

SENATOR JOHNSON: Sure, okay. [LB246]

SENATOR CHAMBERS: All these persons, including any other person, who acts in good faith in compliance with provisions of this section. Does that mean the person complies or that the person acts in good faith attempting to comply? Because if the person complies then why do they talk about good faith? Can you comply with this in bad faith? [LB246]

SENATOR JOHNSON: I don't know, sir. I... [LB246]

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SENATOR CHAMBERS: Okay, then let me continue. Shall be immune from civil or criminal liability for recover of any organ or tissue. That means that organs or tissue could be recovered from a person who is not a donor and there's no liability on anybody anywhere as long as they say we acted in good faith, meaning we thought this was the person. We thought this person agreed to be a donor, but we just happened to be wrong. And also we thought the person was dead, but he or she wasn't. [LB246]

SENATOR JOHNSON: Sir, one of the things that we have included here and it was before you came as we did make the comment that there were the trial lawyers, we had them look this over who would have the greatest interest in this. And they have submitted or we have worked with them to put together an amendment to take (inaudible)... [LB246]

SENATOR CHAMBERS: They don't have a greater interest than I do because they're interested in litigation and recovery, and mine goes much deeper and far beyond what trial lawyers are interested in. So their amendment may not necessarily satisfy me and I didn't know about this amendment that's coming. I wanted to raise some issues on the record of concerns that I have with the bill. [LB246]

SENATOR JOHNSON: Sure, I understand. Sure. [LB246]

SENATOR CHAMBERS: And you were here so I asked you. Even if you had covered it and that's all I have at this point. Thank you, Dr. Johnson. [LB246]

SENATOR JOHNSON: Sure. You bet. Thank you. [LB246]

SENATOR ASHFORD: Thanks, Senator Chambers. Senator Pedersen. [LB246]

SENATOR PEDERSEN: Thank you, Senator Ashford. Senator Johnson, do you have any idea why we put the word coroner in there? Because in Nebraska we don't have any physicians that are coroners, they're all lawyers. The county attorney or the county attorney's designee is appointed by--in Douglas County, for instance--our coroner is an attorney in that office that has been appointed by the attorneys who act as... [LB246]

SENATOR JOHNSON: Senator, all I would say is, you know, I don't specifically know, but that I would guess that that is just the typical language that would be included here. But I realize that is not a very good answer. [LB246]

SENATOR PEDERSEN: Okay, what you're trying to do in general than is basically to get more of these people who are on their death beds, organs into those people who need them because you're know they're going to pass anyway. [LB246]

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SENATOR JOHNSON: Yes, exactly. [LB246]

SENATOR PEDERSEN: And that makes some sense. And they've haven't signed onto a donor list, obviously. [LB246]

SENATOR JOHNSON: Correct. [LB246]

SENATOR PEDERSEN: I think the idea is good, but I don't know how it could work. Thank you, Doctor. [LB246]

SENATOR JOHNSON: You bet. Thank you. [LB246]

SENATOR ASHFORD: Thanks, Senator Johnson. Do you wish to stick around? [LB246]

SENATOR JOHNSON: I will try and stay if I can and thank you very much. [LB246]

SENATOR ASHFORD: Okay. Thank you. Proponents. [LB246]

JAMES BILLUPS: Good afternoon, Senators. My name is James Billups, B-i-l-l-u-p-s. I am an M.D. I'm the medical director for Nebraska Organ Recovery Service. I had prepared testimony and after listening to Dr. Johnson, I would like to define what my role is and maybe just open this up to questions, because I think I can clarify a lot of issues here. My role is to approve and manage protocols to take care of patients so that we can recover the organs. I think you have to understand what a donor is and how we become involved in that. First of all, a donor is declared brain dead by a qualified physician, which means usually either a neurologist or a neurosurgeon. It's not just going to be somebody in the hospital say well this patient has expired therefore they're brain dead. It has to be a qualified physician. Sometimes depending on hospital protocols or rules, it may require two physicians to sign that off. Once that person has been declared brain dead by legal definition, they are dead. Even the organs continue to function and I think we need to really clarify that, because organ function does not mean life. You know, I've had questions like is Terri Schiavo going to be an organ donor? Never, because she was never brain dead by definition. Brain dead means absolutely no function of the brain. In many cases even the brain stem doesn't work to maintain blood pressure and/or respirations. So that's brain dead, and obviously brain dead usually means a catastrophic head injury or an injury in which the brain was deprived of oxygen blood flow for six or eight minutes. So that becomes brain dead. Now the next definition. Who is going to be a donor? A donor is going to be a patient who has either first-person consent agreed to be a donor on their driver's license or in some way, and/or a legal guardian or family representative has said that they will consent. We do not even become involved until that brain death has been determined. We do not go in and try to procure organs from a live patient--ever. There is one

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exception, which is called DCD, which is where a patient can make that request because their quality of life is so poor. Very, very rare does that happen. I think it's only happened once or twice in the state so far. But everything else we don't even get involved until brain death has been declared. We do not pursue the procurement of organs or recovery until we have consent from the person qualified to do that. If we don't get that consent we are left out in the cold. The problem has been--and you'll probably hear this from others--is coroners take control of a patient once brain death or even before brain death sometimes because of possible criminal prosecution. What we have in those cases is a decline and that's why we're here today. [LB246]

SENATOR ASHFORD: Doctor, let me ask you to either...I'm sure there are going to be some questions, so why don't we stop there? [LB246]

JAMES BILLUPS: Sure. [LB246]

SENATOR ASHFORD: Do we have any questions of the doctor? Dr. Pedersen? Mr. Pedersen? Senator Pedersen? [LB246]

SENATOR PEDERSEN: Thank you, Senator Ashford. [LB246]

SENATOR ASHFORD: All these titles are...I mean, I'm just following on with Senator Chambers'... [LB246]

SENATOR PEDERSEN: Doctor, would you finish this thought you had just when you stopped there that the coroners in some other states they take control as soon as they're brain dead. [LB246]

JAMES BILLUPS: No, in pretty near all states the coroner has the right to take control of a case. [LB246]

SENATOR PEDERSEN: Are you from Nebraska, Doctor? [LB246]

JAMES BILLUPS: Yes. [LB246]

SENATOR PEDERSEN: Are they doing that in this state? [LB246]

JAMES BILLUPS: Yes, that's the reason we're here today. [LB246]

SENATOR PEDERSEN: Okay. And so let's say the example that Senator Johnson used, you've got somebody who was shot in the head, victim, been declared brain dead, and they have some organs that could be used. [LB246]

JAMES BILLUPS: That's correct. [LB246]

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SENATOR PEDERSEN: We now, in the state of Nebraska, the coroner has to give us permission even if the coroner hasn't been called yet? [LB246]

JAMES BILLUPS: The coroner, especially we're usually talking about criminal cases in which the coroner is notified, and the problem has been...and I can give you two perfect examples. One is in central Nebraska where a gunshot victim to the head was brought to the hospital. It was determined the injury was so severe there would be no chance of survival, pronounced brain dead. Family very strong advocates for donation and the coroner wanted to accommodate that, but the pathologist that she wanted to send this person to said absolutely he would not do an autopsy if donation was done. They contacted me on this. I proposed that maybe the coroner might find a more accommodating pathologist, which she was willing to do, and to her credit we were then able to pursue that donation. That patient instead of being transferred to west Nebraska was transferred to eastern Nebraska and it was done. The problem is we don't always have coroners that will agree to do something like that and we lose that opportunity. Dr. Johnson was talking about numbers in Nebraska. We had eight declines by coroners last year. If you take the average of four organs per donor and as many as seven possible, you're talking about 32 or 56 people off of that list that can receive those organs. So... [LB246]

SENATOR PEDERSEN: That has helped me a lot. Thank you. [LB246]

SENATOR ASHFORD: Anyone else? Senator Chambers. [LB246]

SENATOR CHAMBERS: But Doctor, so that it's crystal clear for the record, these persons have either expressed when they were able to do so, an intent to have their organs retrieved or somebody in a position to make that decision had made it. [LB246]

JAMES BILLUPS: Absolutely. [LB246]

SENATOR CHAMBERS: Okay. [LB246]

JAMES BILLUPS: If they signed their driver's license that's considered--and it's law--it's first person consent. If the family arrives and is involved in it and the patient is brain dead, unable to obviously make any decisions, the family can do that. We do not pursue organs without one of those two things. [LB246]

SENATOR CHAMBERS: Okay that's clear. Now when it comes to the retrieval, did I hear you use the term autopsy... [LB246]

JAMES BILLUPS: No. [LB246]

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SENATOR CHAMBERS: ...and pathologist. [LB246]

JAMES BILLUPS: The pathologist...if there has been a road block in our system it has been pathologists not accommodating the coroner. Since the coroner, you hear the designee of the coroner, that usually is a pathologist. [LB246]

SENATOR CHAMBERS: And the pathologist is one who will actually remove the organs. [LB246]

JAMES BILLUPS: The pathologist will say I will not participate in an autopsy on this patient if organs have been donated. Now from a medical standpoint, and I'm not a pathologist but I have a lot of experience with managing patients, from a medical standpoint, if we have managed a patient...and we're talking about time frame here. We're talking about oftentimes days. We're not talking about minutes. We're talking about a declaration of brain death, proper consent done. We're talking about tissue typing being done. [LB246]

SENATOR CHAMBERS: Okay, and I'm presuming all of that so I can get an answer to the question. [LB246]

JAMES BILLUPS: Okay. [LB246]

SENATOR CHAMBERS: And I'll ask it differently. Who actually performs the retrieval process? [LB246]

JAMES BILLUPS: The recovery surgeons from the transplant team would do the recovery. [LB246]

SENATOR CHAMBERS: Okay. And after that happens, that's when the pathologist would come in to perform an autopsy. Is that true? [LB246]

JAMES BILLUPS: What we would like to see happen is that they would participate in that procedure so they then can testify that in a degree of medical certainty did not cause this person's death. In other words... [LB246]

SENATOR CHAMBERS: And if the pathologist refuses then you've got to try to find one who will be there at the time the retrieval occurs. [LB246]

JAMES BILLUPS: Exactly. [LB246]

SENATOR CHAMBERS: Okay. [LB246]

JAMES BILLUPS: I think that's very clear. [LB246]

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SENATOR CHAMBERS: I understand now. That's all I have, thank you. [LB246]

SENATOR ASHFORD: Senator Pedersen. [LB246]

SENATOR PEDERSEN: Thank you, Senator Ashford. One more simple question, Doctor. Do we have some pathologists that work good with the retrieval people that will do that what you just said, be part of the retrieval so they could take what tissue or samples of... [LB246]

JAMES BILLUPS: There are only about four pathologists in the state that I have dealt with in these conversations. [LB246]

SENATOR PEDERSEN: Have they been...so they would do that for you? They can retrieve their fluids and things? [LB246]

JAMES BILLUPS: That's why I'm here today. No. You know, someone refuses to get out of bed at 3:00 in the morning to save four lives, we need a law. [LB246]

SENATOR ASHFORD: And that's why you're here. [LB246]

JAMES BILLUPS: That's why I'm here. [LB246]

SENATOR ASHFORD: Just a simple...I mean, in this situation where the pathologist was not willing to proceed you could have a situation where the organ has been removed then someone cannot tell, cannot certify the cause of death. Is that the problem? [LB246]

JAMES BILLUPS: Well... [LB246]

SENATOR ASHFORD: In a gunshot wound situation, you have a criminal investigation. [LB246]

JAMES BILLUPS: Right. [LB246]

SENATOR ASHFORD: And the person who perpetrated the crime is charged with murder, but there's no cause of death. There's no death certificate because the organs have been removed. [LB246]

JAMES BILLUPS: Yeah. [LB246]

SENATOR ASHFORD: Is that what you're talking... [LB246]

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JAMES BILLUPS: Well, I guess I have to take a moment to educate as far as medicine and apologize to the people who will find this very superficial, but when we are assessing a patient or a donor as to organ function, we are doing laboratory whatever, if it's lungs, it's x-rays, it's pulmonary function tests, we're assessing everything. The heart might require a lot of assessment. When we assess that in the donor that then we determine that those organs are yes, they are capable of being transplanted. That is pretty extensive work that we do. Once that's established and a recovery surgeon has accepted him for someone and he does the recovery, he recovers them visually looking at these organs knowing that they have not been traumatized, that they look all right. From that point on, they go into a patient and they work well. From my standpoint, I think almost everyone involved in this process we think that if a heart is working fine and the donor looks all right and is valuated fine and works all right in the recipient, then the likelihood of it being the cause or contributing to the cause of the death of that donor is very, very, very nil. [LB246]

SENATOR ASHFORD: Okay. So that's part of the thought process anyway. [LB246]

JAMES BILLUPS: That's where we're at. [LB246]

SENATOR ASHFORD: All right. Well, having sat next to Arlene Nelson for eight years in the Legislature, and I was here before and she did the bill originally with the driver's license, didn't she? I'm sure she did. I remember her, the good work she did on that bill. Yes, Senator McDonald. [LB246]

SENATOR McDONALD: Okay, they're on life support right? [LB246]

JAMES BILLUPS: Usually, yes. [LB246]

SENATOR McDONALD: Usually on life support. And you're team comes in. I guess I'm looking at the time frame. You're saying 3:00 morning they choose not to come down and to what they need to do to continue with the process, but if they're on life support, don't you have a choice of when the actual time of harvesting the organs is going to be? [LB246]

JAMES BILLUPS: Well... [LB246]

SENATOR McDONALD: Or are we looking at a situation that's not planned so to speak? [LB246]

JAMES BILLUPS: Both. The planning comes in when we try to recover organs from a donor, we try to maximize the effect of that donor, meaning that there's possibly two kidneys, a liver, a heart, two lungs, maybe a pancreas, maybe an intestine. It takes time to coordinate. For instance, the heart may go to Duke University. The liver will go to the

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University of Nebraska. One kidney might go to Arizona. Those recovery teams are flown to Nebraska. You cannot coordinate that to fall at 8:00 in the morning, which is what the pathologists want to happen. So our problem is you have to work with us six or eight times a year to accommodate this even if it's an inconvenience to you. [LB246]

SENATOR McDONALD: So it's a little more complicated than what it appears on the surface. [LB246]

JAMES BILLUPS: It's not TV medicine. You don't say we'll schedule this and everything moves perfect. Sometimes the tissue typing doesn't work and the person we thought was going to be a recipient can't be. Sometimes that recipient may be so ill that they can't...I mean, it's a coordination that is quite complicated. [LB246]

SENATOR ASHFORD: Yes, Senator Pedersen. [LB246]

SENATOR PEDERSEN: Another question, Doctor. Thank you, Senator Ashford. What is the number, Doctor--I don't know, you've have to guess at this obviously--but is of the retrievals that you do that would involve this kind of a thing with the coroner before they do a post? [LB246]

JAMES BILLUPS: We had eight refusals last year in the state of Nebraska. [LB246]

SENATOR PEDERSEN: So that could have been eight... [LB246]

JAMES BILLUPS: That could have been 32-56 potential... [LB246]

SENATOR PEDERSEN: Thank you. Thank you. [LB246]

SENATOR ASHFORD: And your role just so it's...you're at home at three in the morning and someone calls you up and you advise them on the protocol. Is that... [LB246]

JAMES BILLUPS: That's true. [LB246]

SENATOR ASHFORD: Okay. [LB246]

JAMES BILLUPS: And there are obviously a lot of management questions and it may be whether to pursue with the organ function that I'm given the data on whether we should pursue that as a transplant or forego that to move the process along. [LB246]

SENATOR ASHFORD: But there are sufficient, I mean, physicians out in the field to make that determination and normally in a hospital setting. [LB246]

JAMES BILLUPS: That's me. [LB246]

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SENATOR ASHFORD: But you're not there so how do you... [LB246]

JAMES BILLUPS: No, I'm doing it by phone with coordinators. [LB246]

SENATOR ASHFORD: Okay, okay. Thank you, Doctor. [LB246]

JAMES BILLUPS: Sure. Just a side note. New Jersey passed this law and they had the last year before they passed the law they had 15-18 refusals a year. They have not had one declined since the law was passed. So it is an impact. [LB246]

SENATOR ASHFORD: Okay, thank you. [LB246]

JAMES BILLUPS: Thank you. [LB246]

SENATOR ASHFORD: Further proponents. John. [LB246]

JOHN LIAKOS: (Exhibits 9 and \_\_\_\_ ) My name is John Liakos. I'm an attorney in Omaha. I have been associated with the Nebraska Organ Recovery Systems since its inception in the mid-1970s. The issue that we are here today has been addressed from medical standpoint by Dr. Billups. I am going to try and avoid any of the medical aspects of it and rather address the issues involving why we're here and the problem we're trying to solve. Over the years, we have had an increasing problem with the coroner declines. Probably in the last eight or ten years this matter has come somewhat to a head and we have had more and more coroner declines. We have attempted to solve these problems in meetings with the county attorney and the county attorneys have expressed their frustration with the coroner's physicians and that seems to be where we have a problem. Numerous states have addressed this problem. The problem is a national problem and over the past ten years, Texas and New Jersey were the first two states to adopt similar legislation. Since then, New York, Tennessee, Mississippi, California, Rhode Island, Arkansas, Michigan, and Wisconsin have adopted similar legislation. We have been making a study of this issue for a couple of years and we have adopted a lot of the provisions of the Wisconsin legislation. It seems to be the more mature of the legislations passed by the various states. It seems to be a very workable approach to this. We have worked with Senator Johnson's office in attempting to get this issue resolved. There's been a handout given to you containing three amendments to the bill that we are proposing. And the first one in the handout that was given to you is on page 3, line 6 and that is changing the word from requested to donated. And this change came about as a result of our conversations with Jim Cunningham, who I believe is going to be appearing here later on today. And being donated, the reason this has changed is because when there is a donation made it says specifically on the consent that these are the organs that are to be donated. And so the word requested was nonsensical and that was a good change that was asked for. On

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page 4, line 24, this was an error in drafting on our part, something we did not see. The immunity clause originally went to the hospital at which the donation took place. This is on line 24 of page 4. And that is not correct. It should be where the recovery occurs, because where the donation took place might have been in Kearney and the recovery took place in Omaha. So it would always be the place where the recovery took place. So that's the second one. The third one, at the request of the Nebraska Association of Trial Attorneys, they appropriately pointed out that the way this was originally drafted provided blanket immunity, and they wanted some clause in here that accepted out any actions that were caused by the injury due to willful, wanton, or grossly negligent or commission or omission. And I think that was an appropriate change. And so that amendment is being proffered also. This third amendment is very similar to one of the statutes that's been on the books for some time in Nebraska covering the emergency medical service workers. We have immunity clauses in various statues, the Good Samaritan law, various other places. And that is the main part of what I had to present to you. I want to tell you what this does do. It tells that county coroner either make a decision that you are going to release these organs or I need them to determine the cause of death. It does not have anything to do with amending the Uniform Anatomical Gift Act. It does not have anything to do whatsoever with negating the requirement of consent from the next of kin. No organs can be taken under any circumstances even after the coroner gives his release without the next of kin giving their legal consent. [LB246]

SENATOR ASHFORD: Thanks, John. Any questions of John? [LB246]

SENATOR CHAMBERS: They've taken so much time and there are people waiting on my bills. I'm going to go ahead and add to the amount of time taken to deal with this concept of the Good Samaritan. I never have liked that term. The Good Samaritan was a guy who picked up this man who had been messed over by thieves and others, took him to the inn, and told the innkeeper I want you to clean his wounds, take care of him, and I want you to feed him and give whatever he needs, and when I come back through I will pay you what I owe you knowing that he was not going to come back that way again. (Laughter) [LB246]

JOHN LIAKOS: There was a second handout to you which is basically a position paper. There is an organization called NAME--is their acronym--National Association of Medical Examiners. And they prepared and put out a position paper that has been distributed to you for your information. There was another person that was going to testify that had to leave and he asked me if I would pass out or make available to you folks a written statement that he made. His name was Delwyn Youngquist. His wife was an organ donor here in Lancaster County. And it kind of sets forth some of the frustrations they had that they experienced because of the coroner problems and eventually it did turn out that she was a donor. But he asked me if I would pass this out to you folks. [LB246]

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SENATOR ASHFORD: Thank you, John, for your testimony. Any other questions? [LB246]

JOHN LIAKOS: Any other questions? Thank you. [LB246]

SENATOR ASHFORD: Thanks, John. Any other proponents? [LB246]

FREDERICK WARE: Mr. Chairman and Senators, my name is Frederick Ware, W-a-r-e, and it was my privilege and pleasure to serve as the president and medical director of Nebraska Organ Recovery for more than 25 years. Unlike my usual pension, I shall be extremely brief at this time. I simply want to say that in all those years we continued to have the troubles which Dr. Billups so eloquently pointed out. I followed closely the situation all over the country and the literature, and I can assure you that practically every other OPO was going through the same difficulties. Improvements have been made as experience has been gained. And I should point out that I believe there has never been a case lost, prosecution, because of organ donation that was taking place at the same time. And the fears that were extolled by the coroners about how that danger would be imminent just didn't happen. In some places there have been voluntary associations between the coroners and the medical examiners and the organ retrieval organizations, notably in California, but that has not been uniform and certainly has not been consistent or reliable and depends a good deal on the individuals who occupy the positions at any given time. And as John Liakos pointed out, we now have over a dozen states in which virtually identical statutes to the one being considered today have been passed. It's hope that ultimately there will be a national standard that will make this uniform. I would simply say that I ask you please very carefully to consider this bill, because we desperately do need it in Nebraska. Thank you. [LB246]

SENATOR ASHFORD: Thank you, Dr. Ware. Any questions? Thank you, sir. [LB246]

KORBY GILBERTSON: Good afternoon, Chairman Ashford, members of the committee. For the record, my name is Korby Gilbertson. It's spelled K-o-r-b-y G-i-l-b-e-r-t-s-o-n. I'm appearing today as a registered lobbyist on behalf of Nebraska Medical Association Center in support of LB246. The Med Center is in support of this legislation purely because it helps make more people who have intended for their organs to be donated to have that wish granted. And I'd be happy to try to answer any questions. [LB246]

SENATOR ASHFORD: Thank you, Korby. I don't see any. [LB246]

KORBY GILBERTSON: Thanks. [LB246]

SENATOR ASHFORD: Thanks. How many other proponents do we have? Okay. And

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do we have any opponents? Neutral testifiers? Jim, okay. John and Jim. [LB246]

ERIK MITCHELL: (Exhibits \_\_\_ and 10) Hello. Thank you very much for taking the time to listen to me. I'm Erik Mitchell, M-i-t-c-h-e-l-l. I'm a practicing forensic pathologist in Topeka, Kansas. I've been in forensic practice since 1980 and during that time I've been involved in transplant issues fairly frequently. In fact, I'm probably one of the more active forensic pathologists in the country when it comes to dealing with transplant issues. It is my practice and has been my practice for now over 25 years never to stop an organ. I have never found a case where it was required to stop an organ. There are times when it is necessary for me to go to the operating room. They are often inconvenient times. I may have to go at three in the morning. In order to observe and to document what I need for evidentiary purposes. It has always worked out. The organ banks always work with me. There are times where transplants, in fact, have had to take place at a distance and they have made accommodation and gotten me there if I needed to be. We had a case in Missouri a couple years ago, for instance. We ended up with seven transplants--in other words, seven lives saved. They flew me there so that I could be there on time and I flew out the same way the transplant surgeons did. That worked well. I have never had a prosecution that was impeded by transplant of an organ. First off, you don't transplant organs that work. If the organ works, it's not one that I need. Secondly, in the transplant procedures done by the transplant surgeons there are artifacts introduced. If I am there, I can discount those artifacts because I can watch what's happening and I can document what's happening. This works out very well. Over the years I do not know how many organ transplants I have been involved in, but we're getting into the hundreds and it is simply a problem only of dedication and living up to the ethical responsibility of being a physician as to whether those transplants take place or not. If I stop an organ I kill somebody. It is that simple. And there is no need for that to happen. I have demonstrated it in our own practice. If you look at other practice around the nation, there has been a search for a prosecution that was, in fact, a failure as a consequence of a transplant donation. No one has been able to find one. There are straw men that people will raise about evidence loss. As long as you participate--and I have never found a transplant bank unwilling to participate--as long as you participate with the transplant bank you will get the evidence that you need. You will get what you need for prosecution and it works out well. In fact, they will even cooperate with you to the point where we now know about cases earlier than we would before. So it is to our benefit rather than our detriment. It does mean some loss of sleep, but it's not a huge amount. I'd be glad to take questions. [LB246]

SENATOR ASHFORD: Thank you, Doctor. Any questions of Dr. Mitchell? Thank you. That's very informative. [LB246]

ERIK MITCHELL: Thank you. [LB246]

SENATOR ASHFORD: Thank you. [LB246]

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CLARKE MUNDHENKE: Senator Ashford, members of the committee, I want to be as brief as possible. My name is Clarke Mundhenke, C-l-a-r-k-e M-u-n-d-h-e-n-k-e. I am the director of Bryan LGH Medical Centers Department of Pastoral Care and also chair of the Organ Tissue Committee. Having heard all the testimony that's gone before you I'm going to forego some of the things that I had prepared, but simply to say as a medical center we deal with this. We're in the business of saving lives. Unfortunately, we don't save the life of every patient. When that occurs, we like to participate in the savings lives of patients that we have never seen. This bill will enable us as a medical center and other medical centers around the state to be able to do that. And we are fully in support of it. Thank you very much. [LB246]

SENATOR ASHFORD: Thanks. Just one second. Just very quickly. How many would you "guesstimate" how many transplants do you have at Bryan? [LB246]

CLARKE MUNDHENKE: In 2006, we had 11. We had a 93 percent conversion rate. [LB246]

SENATOR ASHFORD: That's spectacular. Any more questions? Thank you very much. [LB246]

CLARKE MUNDHENKE: Thank you. [LB246]

ALAN LANGNAS: Hello. Mr. Chairman, members of the committee, I'm Alan Langnas, A-l-a-n L-a-n-g-n-a-s, professor of surgery and the chief of the transplant program at the medical center. I know the day is getting long, but I just wanted to be certain that this committee knows that as an operational arm of all of this that this bill has our full support. We look forward to working with the medical examiners closely, carefully in the ensuing years after this bill is hopefully passed. And we look forward for the opportunity to helping more Nebraskans live longer. [LB246]

SENATOR ASHFORD: Thank you, Doctor. Senator Pirsch. [LB246]

SENATOR PIRSCH: Just briefly could you comment. How many cases of transplants do you do a year? You're UNMC, is that what you said? [LB246]

ALAN LANGNAS: Right. We do over 300 transplants per year. [LB246]

SENATOR ASHFORD: Wow. That's very exciting. Thank you, Doctor. Okay, thank you. [LB246]

THOMAS TIFFANY VARNEY: Mr. Chairman, committee, I'm Thomas T. Varney, IV. And I'll spell it, T-h-o-m-a-s, and they call me Tiff, T-i-f-f, Varney, V-a-r-n-e-y, the fourth.

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The examples we're given is my son was the gunshot victim January 1 of the proceeding year here. Being a funeral director as well as all Nebraska funeral directors, and working with coroners, hospitals and everything else in the donor program. This is the only thing that we could make anything good come of this situation. We're lucky, unfortunately, that more kids weren't killed in this situation. Gun held 14 more rounds of ammunition, only one was fired. But it is our job to make the world a bigger and better place and I think you'll agree with me, that's what the Lord wants us to do and we did that. And we made this thing work. And you can ask me all the questions, because we sat on the side of this fence and with what you've heard previously the thing that you really need to look at is here is the requirements to be a coroner. Nebraska is 50th in that department in the United States. Anybody can be appointed a coroner here. And most of them are attorneys, as you well know, that have no medical background at all. A lot of times in my job we preserve evidence for law enforcement and them as well to harvest these things and it makes this thing work. And it takes everybody on the same page to get it done. It takes a lot of time. And you know, our son, Moose, and my daughter's brother, there's a lot of people that benefitted from this and a lot of people came together. And we had about--I can't tell you the staff in Kearney that made this thing work--but there's 80 people on the intensive care floor and we overran the whole floor almost. I mean, we were all family when we left there. And being an ex-professional baseball player, this is better than winning the World Series when we came out of there. We were in the harvest, we were in the operating room when they were harvested or taken and used. And it's a great feeling that, you know...and hopefully someday we can meet these people. And I beg you to go ahead with this thing and get it done. There's no reason to even debate it. Get it done. (Laughter) I mean, seriously, you know... [LB246]

SENATOR ASHFORD: Okay. We need that once in awhile. [LB246]

THOMAS TIFFANY VARNEY: Well, I mean, cut to the chase. I mean, I don't want to belabor the point here, but you know, you can do the right thing here and Nebraska's been a leader in this and in the funeral business and in the health care business. And we have a chance to step to the forefront again and do it. And I think it behooves us to do it. That's helping our fellow man. Godspeed and thank you. Got any questions? [LB246]

SENATOR ASHFORD: Thank you. Well, just that thank you for coming and thank you for what... [LB246]

THOMAS TIFFANY VARNEY: All right. Well, hey, let's take our dog up there. [LB246]

SENATOR ASHFORD: Okay. [LB246]

THOMAS TIFFANY VARNEY: There's a dog on the floor. [LB246]

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SENATOR ASHFORD: No, that's fine. Thank you. Thanks. Hi. [LB246]

BARB VARNEY: Hi. I'm Barb Varney, his wife. Our son was Thomas Tiffany Varney, V, and he was 21 when he was shot in the head. They asked what it meant to us if we had not been able to donate his organs. When he turned 16, on his own, he put it on his driver's license and he came home and made sure that we knew. And he had a trucker's license and his other driver's license. He always made sure it was on there. This was what he wanted. When they were going to do the autopsy first out in Scottsbluff and it looked like we were not going to be able to donate his organs, I guess being a funeral director and such, Tiff knew kind of where to push and with the organ donor team they knew how to work it so that we were able to. I talked to the county attorney yesterday there in Custer County, and she said to be sure and tell you that the organ donor team worked closely with her also, giving her all the names of the doctors, any information that she needed to know so that it didn't bother with the investigation. The organ donor team, I mean, as far as working with us, the hospital was wonderful. I had always said that I didn't, you know, obviously no one wants to lose a child, but I just hoped that I could be with them when they died. And so they worked it out so that we could be in there and we got to hold Tiff's hand and his hair as they took his heart. So they work so much with you that they even let that for us. It's really become a focal point for us in dealing with our son's death. I guess I dropped his hat. Some friends had a hat made up. It's got the donor pin on it. We did the landscaping down at the community center and we put the organ donor pin on the catcher. Our son was a catcher. Our youngest daughter has given speeches on organ donation. I think probably a lot of the kids from Arnold have gone online and signed up. In her speech, for her, she said I don't know how I would have reacted with my brother not becoming an organ donor. I wouldn't have anything to turn to when I'm feeling down. I know when I'm upset I listen to the organ donor song. It helps so much that I can't wait to meet the people that my brother helped and he didn't even know them. To me, that is a hero. Thank you. [LB246]

SENATOR ASHFORD: Thank you. Tiff, can we see the hat? You have the hat there. We'd like to...do you mind? [LB246]

THOMAS TIFFANY VARNEY: No (inaudible). [LB246]

SENATOR ASHFORD: You can pass it around. Thank you guys very much. [LB246]

THOMAS TIFFANY VARNEY: Thank you. Well, the Rolling Stones (inaudible) of the front is Rolling Stones. He was a hardcore fan of the Rolling Stones and I guess that's my fault. (Laughter) [LB246]

SENATOR ASHFORD: All right. [LB246]

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THOMAS TIFFANY VARNEY: We attended that on Thanksgiving Day, matter of fact. [LB246]

SENATOR ASHFORD: Well, thank you all very much. Do we have any other testifiers? [LB246]

CINDY SCHABOW: Good afternoon. My name is Cindy Schabow, C-i-n-d-y S-c-h-a-b-o-w. I'm currently the president of Nebraska Organ and Tissue Donor Coalition, which is a nonprofit organization that educates Nebraskans about the need for organ donation and teaches them how to sign up to be a donor. I'm also one of the charter members of New Hearts Transplant Support Group, which is a support group that started with heart patients but now encompasses kidney and liver and all different types of transplant families and those waiting for transplants. But probably my title that I'm most grateful for is heart transplant recipient. We could have easily filled up this room with grateful recipients that wanted to let you know how their lives have been improved, have just been transformed by organ donation. But in respect to your time, if you will allow me I will just sort of represent the recipients of Nebraska and tell you a little bit about my story. I was a healthy, young, working wife and my husband and I decided to start a family and just during the course of my pregnancy it was determined that something was kind of weird with my heart. We later found out that probably I had acquired a virus that ultimately destroyed the heart muscle. For awhile I was fairly stable, but by the time my baby was in kindergarten I was very, very ill and was put on a list for a heart transplant. I ended up in ICU extremely ill on all kinds of drips and oxygen and every kind of thing they do. And later, the doctors told my family that I probably would have lived about 24 more hours. I am very, very grateful to a donor family that agreed to donate their 15-year-old son's heart when he was killed in a tragic accident. It was a coroner's case. It easily could've been blocked. It could've been delayed and this heart could've been buried. If God continues to be as gracious as He has been this July I will celebrate my 20th heart transplant anniversary. My baby is now 26 years old and I have gotten to see her grow up and graduate from high school. I've gotten to help plan her wedding and in May she's having our first grandson. So it has been an amazing gift from this family. Unfortunately, also in those 20 years I have attended way too many funerals of friends that we have made that were also waiting for transplants, and each one is just such a loss because you know that transplants work so well and can really restore life if a donor organ is available in time. And for somebody just to not want to get up at an inconvenient hour and to lose some of the wonderful people that I've lost over the last 20 years is hard to even imagine. We, in our support group, have ordered some Donate Life Nebraska shirts that on the back say to the world you may be one person, but to one person you may be the world. And that's certainly the case with each donor and each one that has graciously agreed to be a donor. And their families have been involved. We certainly want to fulfill their wishes. It's almost a slap to the families, again, if they've not only lost their loved one, but are not able to fulfill their final wishes. So I'm very much in support of this bill. Thank you. Any questions? [LB246]

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SENATOR ASHFORD: Thank you for coming. Thank you very much. Any further proponents? [LB246]

CHRISTI KJAR: Hi. My name is Christi Kjar, it's K-j-a-r. I'm the executive director of the Lion's Eye Bank of Nebraska, where our agency is the one that recover and procure the human eye tissue for transplant. This affects us in a great deal, but not in a lifesaving category, but in life-enhancing. It also affects us probably at a higher level than it does organs, because anybody can be an eye donor. And so we get a lot of coroners that turn down a lot of like gunshot wounds, MVAs, a lot of ER deaths. So this would really impact our business a lot if LB246 was passed. So we are in favor of LB246. [LB246]

SENATOR ASHFORD: Thank you. Thank you for the perspective. Any questions? Thank you. Opponents? Neutral? [LB246]

JOHN LINDSAY: Senator Ashford, members of the committee, my name is John Lindsay, L-i-n-d-s-a-y, appearing on behalf of the Nebraska Association of Trial Attorneys. Senator Schimek and Senator Chambers touched on the area that is of concern to us and that is that the provision provided for immunity from liability, I believe on page 4 of the bill. I would state Senator Johnson's office did share the language with us, did attempt to address our concerns. I think his staff worked with Mr. Liakos to try to draft an amendment that would address our concerns. We don't think it's quite there yet. We simply state that we will try to work with Senator Johnson's office to address those concerns. [LB246]

SENATOR ASHFORD: Good. Probably, you know, work on that. Be good. Any questions of John? Thank you. Jim? [LB246]

JIM CUNNINGHAM: Senator Ashford, members of the committee, good afternoon. My name is Jim Cunningham, C-u-n-n-i-n-g-h-a-m. I'm appearing in my capacity as executive director of the Nebraska Catholic Conference. I got into some hot water on this bill with some of the proponents and it was because I read the bill or maybe I should say I tried to read the bill and that's a dangerous activity. Organ donation is a good thing. It's an act of charity. Something to be encouraged. But there are some concerns about that and that is that organs should not be taken before the person is dead nor should organs be taken without some act of consent, because if there's no act of consent then it's not a donation it's a taking, which I think most people would judge to be questionable, maybe utilitarian and disrespectful toward the decedent. Anyway, my concern has really focused on the definition of donor and maybe those questions have been answered, because I think the record has been very good here this afternoon. But I had a particular hang-up with the definition of donor because it starts out by saying that a donor means a person or a decedent within the jurisdiction of a coroner. And I ask myself the question what person who is not a decedent is within the jurisdiction of a

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coroner? And maybe that's been handled and is understood. But I look to see what bodies are under the jurisdiction of a coroner and in each incident it seems to presume that the person is dead that is under jurisdiction of a coroner, and in a lot of cases it would be a child or someone under the age of majority by the way. But I think there's also a concern perhaps with the Roman numeral III, the third part of the definition of donor, because first of all, a decedent having any organ or tissue that is compatible for transplantation...well what's the difference between that and a potential donor? When it says potential donor or decedent. And then the other concern might be a potential donor is someone who's not yet a donor, but might be a donor. And then I think Senator Chambers probably focused in on this. That becomes a question of interpretation I think when you get over to page 3 on line 16, because it says the organ or tissue shall be recovered as though the donor, which would also mean the potential donor, someone who is not a donor but is not yet a donor, was not within the coroner's jurisdiction. And I think that was really a relevant question and I hope it's clear in the record and if it can be made more clear with the definition of donor, I think it should be, and that is that that is not authority to recover organs from someone who is not yet dead or for which there has not been consent. In other words, a potential donor, which is part of the definition of donor. So if there's a way to clear some of that up I hope the committee would take account of that. I think that the record did address those concerns, hopefully in a thorough fashion. Thank you. [LB246]

SENATOR ASHFORD: Thank you, Jim. Any questions of Jim? [LB246]

JIM CUNNINGHAM: Could I mention just one other thing? I forgot about it. On page 4, line 3, says if the coroner releases any organ or tissue for recovery, and I assume that would mean from a decedent, and then it says may request an ante mortem blood sample. How do you have a prior to death blood sample from a decedent? Maybe I'm just not understanding that in the context of the medicine. So thank you. [LB246]

SENATOR ASHFORD: Thanks, Jim, for your comments. Any other neutral testifiers? That concludes the hearing. Thank you all. Senator Pedersen, LB107. I'm sorry, Senator Johnson. I apologize. I'm very bad at that closing thing. Thank you. All right. Thank you. Senator Pedersen. [LB246 LB107]

SENATOR PEDERSEN: Thank you, Senator Ashford and colleagues on the Judiciary Committee. I'm here to introduce to you today LB107. I am Senator Dwite Pedersen from the 39th Legislative District. This bill would authorize the position of a deputy public counsel for institutions within the office of public counsel commonly known as the State Ombudsman's Office. I personally believe that the State Ombudsman's Office is one of the best kept secrets of our state government. When the office was established by the Legislature in 1969 it was consistent with the model outlined by the American Bar Association. The ombudsman concept provides not only a place for citizens to lodge a complaint against a government agency, but an office that can advocate for changes in

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the management and operation of such governmental agencies while promoting the improvements in the quality of government services these agencies offer. In order to do this, the office of the public counsel was granted broad investigatory powers as well as access to all agency records and facilities. The office also has the power to subpoena records and testimony if necessary. I believe that it is significant that over 35 years ago the Nebraska Legislature recognized the need for an independent office where citizens could take their complaints about state government agencies and know that they would be received, investigated, and resolved. The office has evolved over the years and added personnel, as situations warranted, with the deputy ombudsman for corrections established in 1976 to deal specifically with complaints from inmates with the correctional system and the deputy ombudsman for welfare services added in 1997 to deal specifically with problems that arouse from the implementation of a new welfare system. Last year some events transpired that led to the introduction of this bill. As you will remember, the state of Nebraska received some unwarranted publicity with federal inspectors when federal inspectors found major problems at the Beatrice State Developmental Center followed two weeks later by an inspection that uncovered major issues at Omaha's Thomas Fitzgerald Veterans' Home. At that time, I publicly voiced my outrage at complaints I had received that the staff persons at the veterans' home had been ignored by facility administrators. Former senator Dennis Byars was quoted as saying that he had been repeatedly assured by the administrator of the Beatrice facility that problems he had been alerted to were being addressed. Senator Byars indicated to the Lincoln Journal Star that he too was given lip service that the complaints were being addressed. Unfortunately, as the inspectors documented these assurances were not backed by action. The federal inspection of the Beatrice State Developmental Center pointed out major problems in three areas including insuring that residents are free from physical, verbal, sexual, or psychological abuse; using restraints in a manner that does not harm the well-being of the residents; and implementing procedures so that residents do not suffer mistreatment, neglect, or abuse. The inspectors at the Thomas Fitzgerald Veterans' Home found major violations relating to providing correct care and basic dignity for residents as well as improper documentation of medications and insulin, poor training on certain procedures, and lack of cleanliness and privacy in bathing. While administrators at the Department of Health and Human Services immediately scrambled to address the problems, I believe that these events have also pointed out the importance of the Legislature exercising it's responsibility to provide oversight and accountability. I believe that by utilizing the services of our State Ombudsman's Office provide a place for residents, their families, guardians, staff and other interested persons to lodge a complaint and know that it will be investigated and acted upon is a logical thing to do. The staff of this office has the experience and expertise needed to look into these types of complaints and to resolve them by working with the agencies to protect the well-being and dignity of all persons being served by these institutions. LB107 provides that a position be added to the office of public counsel which would be known as the deputy public counsel for institutions. The authority of this person would extend to all mental health and veterans institutions and

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facilities operated by the Department of Health and Human Services and to all complaints pertaining to the administrative act of the department concerned concerning the rights and interests of individuals placed within these state institutions and facilities. Passage of this bill would provide improved legislative oversight of the Beatrice State Developmental Center and state veterans' home and the regional centers. It would insure that the persons living in these institutions or those who are responsible for them would have access to an unbiased representative of state government whose responsibility lies with doing what is right for the patient and client and who has the statutory authority to recommend changes which will improve the situation. By authorizing this position within the agency that already has expertise in the fine art of complaint handling, I believe we will be protecting the rights of those who cannot speak for themselves, which in my opinion, is what we were elected to do. Marshall Lux, our state ombudsman, is here today and he will follow me in testimony and how he envisions this will work. Any questions I'd be glad to try and answer them for you. [LB107]

SENATOR LATHROP: Senator Schimek. [LB107]

SENATOR SCHIMEK: Yes, thank you, Mr. Chairman. Senator Pedersen, this says he shall appoint or she shall appoint and designate this person, correct? [LB107]

SENATOR PEDERSEN: Yes, Senator. [LB107]

SENATOR SCHIMEK: So it requires it. [LB107]

SENATOR JOHNSON: It requires them to have one, yes. [LB107]

SENATOR SCHIMEK: Okay. I think there's a little bit of discussion about that and several different things here, and they don't necessarily agree with each other. So I wanted to clear that for the record. Thank you. [LB107]

SENATOR PEDERSEN: Be glad. Thank you. [LB107]

SENATOR LATHROP: Any other questions? Okay. Proponents. [LB107]

MARSHALL LUX: Good afternoon, Senators. My name is Marshall Lux, L-u-x. I'm the ombudsman for the state of Nebraska and I'm here to testify in support of LB107. Senator Pedersen has related to you already the history of our office and of how it's organized. Ever since the inception of the office we have had jurisdiction over complaints that would come to our office from regional center facilities, the veterans' homes, and from the Beatrice Developmental Center. And we've worked very hard in trying to address those cases as they come in on a one-by-one basis, and I think we've had some successes in dealing with those individual cases. But I have to tell you that

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I've always been frustrated by the fact that I felt that in dealing with these cases from these facilities we never got the kind of traction that we have gotten over the years, say, with corrections cases where our office has dealt very thoroughly with corrections issues, has handled those issues over the years. We've been able to penetrate that administrative system in terms of the Department of Corrections, but we have never been able to get that same kind of sense of success in dealing with the facilities that Senator Pedersen's bill is talking about. And my understanding of his bill is that he wants to set an agenda for our office that would make us put more focus on these facilities and try to do with them what we have done with corrections. I think that's a good idea. It will give us a new resource. I think that's a good idea. I support this bill. I think it will work. I think we can make it work. And I wanted you to know that I do support this legislation and I'll be happy to answer any questions that anybody has about how this might work. [LB107]

SENATOR LATHROP: Any questions? Senator Pirsch. [LB107]

SENATOR PIRSCH: Just briefly. Which governmental entity has responsibility now for that type of oversight? [LB107]

MARSHALL LUX: Technically, our office does. We have always had jurisdiction over complaints dealing with administrative agencies of state government. So complaints from the regional centers, for instance. They come to our office. We have the power to investigate and we are investigating those cases as they come in. But we have never had an individual staff person who was dedicated to dealing with those kinds of cases. And that's what this bill would do. It would create a new person on our staff like our deputy for corrections or our deputy for welfare services, whose job it would be to concentrate on these cases and try to get a handle on the administrative systems that we're talking about--the regional centers, the veterans' homes, and developmental center--and understand those systems and really gain some traction in dealing with those systems that we don't have yet in the way that we have with the Department of Corrections. [LB107]

SENATOR LATHROP: Very good. Any other questions? Okay, thank you, Mr. Lux. [LB107]

MARSHALL LUX: Thank you. [LB107]

SENATOR LATHROP: Next proponent. [LB107]

JAMES SHUEY: (Exhibit \_\_\_) Distinguished Senators, I want to first thank your committee for affording me the time to speak on behalf of LB107. My name is James Shuey, S-h-u-e-y, and I'm presently serving as the legislative director for the Disabled American Veterans Department of Nebraska as well as Chapter 7 here in Lincoln. I

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come before you today to express the Disabled American Veterans support for LB107. We feel that any improvements that can be made to oversight of our states veterans' homes will only make for a better quality of life for the veterans who reside in those facilities. A deputy counsel with the assigned duties of dealing with our mental health and veterans institutions will most certainly help in assuring that any complaints or issues that may arise are dealt with in a fair and unbiased manner. It is the Disabled American Veterans position that if we can have deputy counsels for the state's incarcerated population as well as for welfare services, then somehow we have to be able to find a way to extend that same privilege to the men and women who answered the call of service for this country. Our veterans deserve nothing but the best of care by the highest qualified, most capable caregivers available. We believe a program of prudent oversight will help assure they receive it. Thank you again for allowing me this time to speak on behalf of the Disabled American Veterans. Your support of LB107 will go far to insure the quality of life the veterans of this state deserve. Thank you. [LB107]

SENATOR LATHROP: Thank you, Mr. Shuey. Any questions [LB107]

JAMES SHUEY: Thank you. [LB107]

BRAD MEURRENS: (Exhibit \_\_) Good afternoon, Senator Lathrop and members of the Judiciary Committee. For the record, my name is Brad Meurrens, B-r-a-d M-e-u-r-r-e-n-s, and I am the public policy specialist and registered lobbyist for Nebraska Advocacy Services, Inc., the Center for Disability Rights, Law, and Advocacy. For over 28 years, Nebraska Advocacy Services has worked to address systemic abuses and rights violations of persons with disabilities in state operated facilities, especially the three regional centers and the Beatrice State Developmental Center. Our approach includes working directly with staff of state facilities and, when necessary, through litigation, in order to improve the care, treatment and protection of facility residents. I am here to offer today our support for LB107. Over the past several years, the Center for Medicare and Medicaid Services has conducted inspections of state operated facilities for people with mental illness, people with developmental disabilities and veterans. The results of these inspections demonstrate a cyclical pattern in which deficiencies in the treatment and protection of facility residents are identified, followed by a submission of a plan of correction that promises short-term resolution, but inevitably results in subsequent inspections finding additional deficiencies. A review of the statements of deficiencies and plans of correction contain numerous examples where CMS stands for resident care, rights and treatment were repeatedly not met, placing the residents at an imminent risk of harm. We would be willing to provide specific examples if requested. The failure to address the underlying systemic problems identified during their inspections places the facility in immediate jeopardy status and at risk of losing federal funds. This pattern has been repeated so frequently that advocates for these populations are greatly concerned. Advocates are unanimous that more oversight and accountability must be in place in order to insure that care, treatment and

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safety of vulnerable Nebraskans in the custody of the state meets established standards. We strongly support the creation of the Deputy Public Counsel for Institutions as proposed in LB107, which creates another avenue for the state and the public to hold accountably those institutions responsible for the care and custody of vulnerable individuals. We believe that the situation in state operated facilities demonstrates a grave need for increased accountability and responsibility. As long as Nebraska continues to support institutional living environments for people with disabilities, then the state must hold those institutions and itself, by proxy, to the highest standard of care, which is directly what the Deputy Counsel for Institutions would do. We do have some suggestions to strengthen LB107. In order to achieve the goals of LB107 effectively and in the spirit of greater transparency in government operations, we recommend that the Office of Public Counsel post informational materials in state-operated facilities to make residents aware of the Public Counsel for Institution's purpose, authority, and responsibility as well as how to contact the Public Counsel for Institutions. We also recommend strengthening the reporting requirements of the public counsel. And I have the suggested language in the text of my written statement. In the interest of brevity, I would be willing to answer any questions that the committee might have at this point. [LB107]

SENATOR LATHROP: Thank you and we do see that suggested language on the back page of your testimony and we can take a look at that. [LB107]

BRAD MEURRENS: Great. [LB107]

SENATOR LATHROP: Does anybody have any questions for Mr. Meurrens? No questions. [LB107]

BRAD MEURRENS: No? Great. [LB107]

SENATOR LATHROP: Thank you for coming down. [LB107]

BRAD MEURRENS: You're welcome. [LB107]

SENATOR LATHROP: Appreciate it. Any other proponents? Any opponents? Anyone testifying in a neutral capacity? And Senator Pedersen waives, so that will conclude our hearing on LB107. Senator Chambers, you're up on LB467. [LB107 LB467]

SENATOR CHAMBERS: Yes. Chairman Lathrop, members of the committee, with the arrival of Senator Pedersen and Senator Chambers in the witness box, you're now being addressed by the A-team. (Laughter) You will see that not a great amount of time is going to be taken. If you look at the statement of intent that I've prepared for you, you can get an understanding of what this bill will do. So in order to save time, because Senator Pedersen has explained some background of the office, I'm going to read the

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operative language in this bill. It would be found on page 2. Oh, I'm Ernie Chambers. I represent the 11th Legislative District. So it's clear that I'm testifying as the introducer of LB467. The ombudsman or public counsel has certain powers and duties, and you can see beginning on page 2 in line 5 what those are. Then in line 13 I would add this language: And any county correctional or jail facility and employee thereof acting or purporting to act by reason of connection with the county correctional or jail facility. What that means is that the same type of work the Ombudsman's Office does in handling complaints and other matters in the state correctional system, that will be done at the county level. I don't know how many other senators get mail in the form of complaints from county inmates, but I constantly get it. I do not have the time or the wherewithal to address them. So even though the Ombudsman's Office does not have that explicit authority, I pass them on. They do what they're able to do. There is a jail standards commission or board or whatever it's called, and they look at the physical plant. They look at the compliance of these jails with certain standards, but there is not designated agency that addresses complaints of inmates. This bill is designed to authorize the Ombudsman's Office to do formally and officially what they're doing to the extent that they can now. Obviously, this work is not going to be doable with the staff that they have currently. I think, perhaps, three additional employees would be needed. But the ombudsman is a wise person, understands that we begin an operation and show what can be done with a lesser compliment of employees than I thought. And then if additional work would be needed or workers or helpers, that could be done. So in conjunction with Ombudsman Marshall Lux, this bill will authorize that office to do the things that I've mentioned. It will create or authorize two additional employees. And I will have an A bill prepared to show what the cost of that will be. So if you have any questions of me I'm prepared to answer them, but I don't want to take time to say more than is necessary to make clear what it is I'm trying to get done. [LB467]

SENATOR LATHROP: I think it was very clear. Senator Schimek. [LB467]

SENATOR SCHIMEK: Thank you, Mr. Chairman. Senator Chambers, my only question at this point is whose responsibility would these county jails be then? Would it be the same person that deals with our correctional system? [LB467]

SENATOR CHAMBERS: You mean, under this bill? [LB467]

SENATOR SCHIMEK: Yes. [LB467]

SENATOR CHAMBERS: There would be two additional employees in the Ombudsman's Office who would be dedicated to handling the complaints of county jail prisoners. [LB467]

SENATOR SCHIMEK: It would authorize that, but I thought you just said that the Ombudsman was not convinced that he would need that staff. [LB467]

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SENATOR CHAMBERS: No, I wanted three. He says he can start with two. So I would... [LB467]

SENATOR SCHIMEK: Okay. [LB467]

SENATOR CHAMBERS: In the A bill it would authorize two employees and state the amount it would cost for them. [LB467]

SENATOR SCHIMEK: Thank you. [LB467]

SENATOR CHAMBERS: Okay. [LB467]

SENATOR LATHROP: Senator Pedersen. [LB467]

SENATOR PEDERSEN: Thank you. Senator Chambers, real simply, you think the bill that I just introduced and this one could be melded into one? [LB467]

SENATOR CHAMBERS: I don't want my little horse to have to carry a jockey bigger than the horse. So we'll discuss in the exec session and see what the feeling of the body would be. [LB467]

SENATOR PEDERSEN: Thank you. Thank you. [LB467]

SENATOR LATHROP: Okay, thank you very much. [LB467]

SENATOR CHAMBERS: My pleasure. [LB467]

SENATOR LATHROP: Mr. Lux. [LB467]

MARSHALL LUX: Senators, my name is Marshall Lux, L-u-x, the Ombudsman for the state of Nebraska, and I'm here to support and offer myself to offer any questions on LB467. Senator Chambers and Senator Pedersen are the A-team. Both of them have done a much better job than I could do in explaining each of these bills and what they would do and what they would accomplish. Basically, LB467 would involve a very narrow extension of our jurisdiction to deal with complaints that come from county jails. We get lots of complaints over the years. Senator Chambers sends his complaints, they come to us directly as well, that come from county jails. And we've been frankly frustrated because those are not complaints that are in our jurisdiction. Yet, there's this paradox that the issues that they present are essentially parallel to the kinds of issues that we deal with when we deal with corrections cases, cases from the Department of Correctional Services over which we do have jurisdiction. So we have expertise in dealing with these issues, but when they come to us from a jail as opposed to a state

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penitentiary, we have to say sorry we don't have jurisdiction. Now as Senator Chambers has suggested, we don't always say that. Sometimes we follow up because some of the issues are so dire that we can't just close our eyes to them. But legally, we don't have the authority to follow up on these issues and LB467 would give us that authority. I want it. I want that authority. I want to do that. I've worked in this job for many years and it's gotten very frustrating for me to have to tell people who complain to our office from the Lancaster County Jail, for example, about a serious medical issue that well, I'm sorry, but you know, that's just not our area. That's not a good thing. And it certainly isn't a good thing for the person who's complaining either. LB467 would get us over that hump and would allow our office, which has expertise in dealing with these issues, to address these kinds of issues that we're dealing with in prison cases now in jail cases. And I support the bill enthusiastically and I'm happy to answer any questions about how it would work. [LB467]

SENATOR LATHROP: Very good. Any questions? Senator Pirsch. [LB467]

SENATOR PIRSCH: Just briefly. Who's tasked now with that responsibility to investigate complaints at the county jails? [LB467]

MARSHALL LUX: Actually, nobody, Senator. The Nebraska Jail Standards Board has the duty to inspect the county jails, but those inspections have to do with determining whether they're meeting the basic jail standards. So there might be a periodic inspection. And the Jail Standards staff will ask, you know, whether they're meeting the standards and if they are meeting the standards and they're satisfied. Problem is that the kind of complaints we're dealing with are questions not about what the standards are and whether the jail is meeting the standards, but about how they're treating individuals in specific situations. And that is not what the Jail Standards Board does. So the answer is nobody, really. [LB467]

SENATOR LATHROP: Thank you. Any other questions? All right. Thank you, Mr. Lux. [LB467]

MARSHALL LUX: Thank you. [LB467]

LAUREL MARSH: (Exhibit 11) Good afternoon. My name is Laurel Marsh, M-a-r-s-h, and I'm here today as the executive director of ACLU Nebraska in support of LB467. We support LB467 as a way to effectively deal with eighth amendment problems that we see arising at the county jail level. ACLU receives many requests on a regular basis from men and women who are briefly incarcerated at county jails. A small number of the complaints are frivolous, but most point to some very serious problems. The most serious of those problems arise from jails that are not providing medical care and prescriptions from people with diagnosed physical or mental health problems. The irony is that our state prisons where the most dangerous convicted felons are housed have

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better delivery of services to inmates than county jails. In contrast, the county jails are filled with non-violent offenders who may only spend a couple of days behind bars. Yet, if a person has heart disease, diabetes, or schizophrenia, and doesn't receive his or her prescription for a few days the results can be disastrous. We've distributed a short report and I would like to call your attention to a discussion of problems and recommendations. The specific problem that we're talking about is discussed on the bottom of page 7 and the top of page 8. And there's a short recommendation number five on page 9 in which we basically see that developing a new watchdog entity would insure meritorious complaints result in action against jails that are not compliant with laws. And so we see the LB467 as a very positive answer to our suggestion of a watchdog entity and think that the Ombudsman's Office does a great job. The report we've distributed was issued in December 2005. It investigates systemic problems in our county jail system. We don't mean to harshly criticize the Jail Standards Board, which is the sole place where complaints can be made by inmates, but their structure is just not adequate to deal with emergency problems. The Jail Standards Board does not have a phone number for inmates to call and meetings are held only a few times a year. It doesn't resolve easily for the quick resolution of emergency health care problems. The Ombudsman's Office already has the experience of investigating and resolving medical problems and other inmate complaints. We believe that office is a great fit for overseeing problems that arise at the county level and we commend LB467 to you and ask you to advance it to General File. Are there any questions? [LB467]

SENATOR PEDERSEN: Thank you. Is there any questions? Seeing none, thank you, Laurel. Do we have anymore proponents? Is there any opponents for LB467? [LB467]

RICK BOUCHER: (Exhibits 12 and 13) Senator Pedersen, members of the committee, my name is Rick Boucher, B-o-u-c-h-e-r. I appear before you today as the registered lobbyist for the Nebraska Sheriff's Association. I'm appearing today to oppose LB467 that would extend the authority of the State Ombudsman to county correctional facilities. The materials that are presently being passed out are really a couple of the rules and regulations of the Jail Standards Board. One is denoted as the investigation investigating complaints of violations of minimum standards. When we say minimum standards under the jail regulations, they are encompassing that not only include security, but also the provision of medical services, mental health services, and the wide range of recreation, a wide range of those activities that have been considered to be minimum within Nebraska. I'll talk a little bit about the constitutional issues, but I wanted to...the Jail Standards, the other regulation indicates how they pursue these matters in district court. It wasn't many years ago that the district court judges, at least one in each jurisdiction, was kind of in charge of jails. You have since moved that away from the courts recognizing maybe the conflict, but for other reasons. Besides the Nebraska Jail Standards Boards there is also an internal jail process in the event you need something, whether it's recreation or medication. You would pass a kite along to a jail officer who would in turn provide it to the corporal or the sergeant. In addition to the internal jail

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process and the Nebraska jail standards, you also have state courts who oversee the courts under 42 U.S.C. 1983. Federal courts, especially under the Federal Prison Litigation Reform Act of 1995, have a fast track system where even before it is served on a facility of the 72... [LB467]

SENATOR CHAMBERS: Mr. Boucher? [LB467]

RICK BOUCHER: Yes. [LB467]

SENATOR CHAMBERS: Could you state your name and spell it again so that we can get it for the record? You did state it, but we want to get it. [LB467]

RICK BOUCHER: Yes. Rick Boucher. Thank you, Senator. B-o-u-c-h-e-r. I'm here on behalf of the Nebraska Sheriff's Association. In addition to federal and state courts, in addition to the internal jail process, county officials who I work with also are contacted by the ACLU, the Americans with Civil Liberties Unions, occasionally by defense lawyers who indicate that their client who may be a pre-trial detainee. Occasionally a convicted individuals come under the eighth amendment, pre-trial detainees under the 14th, and occasionally particularly with the provision of medical services occasionally Health and Human Services become involved also. Some of the jail facilities have nurses and professional staff, whether they be licensed mental health practitioners or otherwise. The constitutional standard requires medical care as it's shown to be jail personnel or deliberately indifferent to a serious medical need. It's not for all medical needs. It's for serious medical needs. The Prison Litigation Reform Act, which I think would be involved also in this should another body be part of the process. It is an affirmative defense for counties or other facilities to say they have not exhausted administrative remedies. For instance, within the jail the courts screen it to make sure that, for instance, a complaint is not malicious or frivolous or fails to state a claim, but also to see if there's been compliance with the administrative process. Adding another layer may well postpone a federal court from looking at the deprivation of a serious medical need. Want to tell you in terms of training, mandatory training has been ever present for many decades for police officers, law enforcement, as well as jail staff. They have a new component, medical procedures. And within the last several years have started to focus also on mental health issues, which are difficult under the best of circumstances, but also in those. And I would tell you the physical plants, even the most casual observer of our newspapers, realizes for instance, Lancaster County is going to invest about \$90 million in a plant, a new jail. Douglas County just added about \$50 million. Hall County is building one. Scotts Bluff County finished one. Buffalo County, Saunders County has just passed one, Seward County, and the list goes on. So is the system perfect? No. Are we trying to make strides in mandatory training enhancing that instruction? Yes. Are physical plants improving? Yes. And I think at least, that there is adequate review at various levels and that another level is not necessary. We respectfully disagree with Senator Chambers concerning the need for the LB467 and I'll

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try to answer any questions you might have. [LB467]

SENATOR PEDERSEN: Thank you, Mr. Boucher. Is there any questions from the committee? Senator Schimek. [LB467]

SENATOR SCHIMEK: Yes, thank you, Senator Pedersen. Mr. Boucher or Rick, I want to know how long this process as outlined under C could possibly take. Because I look at it and I think, gee, this could take a month or it could take six weeks. I'm not sure how long this process takes from the time the complaint is made until it's resolved. [LB467]

RICK BOUCHER: Okay. [LB467]

SENATOR SCHIMEK: And it actually doesn't even talk about resolution here. So I guess I...just expand on that a little bit. [LB467]

RICK BOUCHER: Okay, if it is...and you, Senator Schimek, have had complaints alleging violation of standards relating to site, life, and security issues. Let's assume it's a medical...it's my understanding that the...really, I see it in two ways. First of all, it's dealt with at the jail. Jails can be held responsible or liable under the political subdivision Tort Claims Act as well as sometimes under the Civil Rights Act for deliberate indifference to a serious medical need. From a practical standpoint, most facilities respond. Let's say that someone said I need my heart medication or I need to see a doctor. Usually at the local level is the first response where you say to a corporal I'm having serious chest pains. I've got a history. I have two stints. Ordinarily, what happens is that a physician or a nurse is contacted and it's determined whether that person should be taken to a facility, whether Bryan Hospital or otherwise. Now when you're talking about C you're talking about the Jail Standards Board. It's my understanding with a serious medical need--a heart condition, stroke, or otherwise--that in the event that service is not being delivered that...and for instance, an inmate would contact whether jail standards or file a complaint, that Deb Gilg, who has been chairman of the Jail Standards for years, is contacted. She may well initiate a call with the jail facility or the jail administrator. You know, nowadays we're moving not only physical plants and training, but also there's an awareness that corrections is a little bit different than law enforcement. So you're having jail executives or you have jail administrators as opposed to, for instance, Sheriff Dunning or Sheriff Wagner. They don't run the jails. They have jail executives that do. So in terms of your response, an immediate response is provided, one, at the jail level one way or the other. You know, someone is contacted. Oftentimes there's a disagreement over diagnoses. Let's say that one physician says I think he needs to be here. Another doc says I really don't think he needs to be at the emergency room. At least what the cases have indicated, whether from the eighth circuit or from the U.S. Supreme Court is that that negligence is not enough. That gross negligence is not enough to trigger the constitutional protection. So it's really that disagreement between two physicians doesn't equal a constitutional violation. From a

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practical standpoint, it can be taken care of at the local level even without triggering any review by the Jail Standards Board. [LB467]

SENATOR SCHIMEK: But if there isn't a response at the local level as...you know, I think there's a letter in here from one particular incarcerated person that ACLU just furnished us. And, you know, even after the jail was told that this person needed their medications it was a long drawn out process. And this person really needed these four medications. And even after it was determined that the jail would do it then apparently they had to have some doctor come in and examine. They wouldn't take the word of the doctor of this particular person. It just got to be a long process and that can be a life and death situation sometimes. I'm not saying that probably happens a lot, but what if the jail doesn't do it? Then you have to investigate. The Jail Standards Board has to investigate, right? [LB467]

RICK BOUCHER: Yeah, and it is triggered--and if you look in the front--it is triggered by a complaint in writing. For instance, acceptance of complaints. You know, if you see that it's that all complaints must be received in writing. No verbal complaints. [LB467]

SENATOR SCHIMEK: Yeah. I don't want to draw this out. I saw that. [LB467]

RICK BOUCHER: So what I would tell you is more often than not my familiarity with the jail standards is not as good as it is on the local level where responses are made where either nurses, for instance at Sarpy County, full-time nursing staff or a physician is on call. And when you say medication is needed, oftentimes they simply can't produce the...if they can't trace it back. Someone may come in, for instance, on hydrocodone, you know? And it may not be traced back readily until a physician is available. And just as Walgreens has sometimes difficulties getting ahold of physicians to verify prescriptions, so do others. It's my understanding, though, that, you know, if there is...that in those situations if we can agree as to an emergency. Immediate medical care is necessary to avoid prolonged suffering or permanent injury or death, that those decisions can be made at the local level... [LB467]

SENATOR SCHIMEK: They can be, but if they're not? I mean, it looks like this is a long, involved process to resolve the situation. And meanwhile, this person is not getting their medication. I mean, there has to be an investigation, maybe they'll schedule a time that they were already going to go in and do an on-site visit. That might be several weeks down the road. Staff has to prepare a written report for the chair and the vice chair. And then staff has to forward the report. And they have 10 working days, it looks like, to advise the chair or vice chair of the findings. I mean, time is a wasting here. I'm not sure I like that process. [LB467]

RICK BOUCHER: Well, no, Senator. What I'm saying is you're skipping into a state agency where most of these issues are resolved at the county jail. [LB467]

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SENATOR SCHIMEK: I understand that. [LB467]

RICK BOUCHER: Okay, either by the county attorney... [LB467]

SENATOR SCHIMEK: I understand. [LB467]

RICK BOUCHER: ...or the defense lawyer getting a judge...I mean, judges are involved in the process. So what I'm saying is ultimately, do deaths occur? Of course they do. They do in a lot of places whether it's misdiagnosis or otherwise, but as to the provision of medical care it is done by a fairly well-trained group of both jailers...for instance, in Sarpy County besides jailers there are all trained sworn officers. [LB467]

SENATOR SCHIMEK: You've made your point and I think I've made my point. [LB467]

RICK BOUCHER: Okay. [LB467]

SENATOR PEDERSEN: Yes, Senator Chambers. [LB467]

SENATOR CHAMBERS: Mr. Boucher, what you've talked about is gobbledegook, to be honest. I have had to call jails to make them give medication to these inmates. It's not done promptly. These are not highly trained people and this document you gave us is from 1997, which is 10 years old. They haven't see a need to update? And this other one talking about Nebraska Commission on Law Enforcement and Criminal Justice, it's dated February 15, 1996. So that makes it... [LB467]

RICK BOUCHER: Yeah, these are currently...Senator, they are currently on the website and they're currently in place. [LB467]

SENATOR CHAMBERS: Mr. Boucher, you gave us this. [LB467]

RICK BOUCHER: Yes. [LB467]

SENATOR CHAMBERS: Now what Senator Schimek said is true. A lot of times they stall hoping that the person will leave the jail before they have to do anything. A woman in Douglas County who had been tazed by the police wound up dying in jail and the family...this was very recently. She had not been given the treatment or the medication she needed. So you can talk all of this stuff you want to. You took forever telling Senator Schimek about going to court, the federal courts, and all of these things that allow delay, but you didn't answer her question which is what happens if they don't do anything? Nothing happens. They call me. They call Senator Pedersen. We know what we're talking about. You're just a mere lobbyist. You're paid to say what you're saying. We deal with these issues. Not just the inmates, but their families. And I have called jails. If

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you don't believe it talk to Mr. Houston who was the director in Douglas County. And he would have to intervene. And when my name was given, oh there was just a breakdown in communication. We're going to take care of that. You have said what you think is necessary. My job is to persuade my colleagues that what you've talked about is nonsense. But I'll ask you this to be fair. How many inmate complaints have you processed yourself? [LB467]

RICK BOUCHER: I have probably tried 25 cases in both state... [LB467]

SENATOR CHAMBERS: Not trying cases. How many complaints other than those that you wound up trying have you handled? [LB467]

RICK BOUCHER: I haven't handled any. [LB467]

SENATOR CHAMBERS: Now when one comes to you and you take it to trial, what are the circumstances that will lead you to litigate that case? [LB467]

RICK BOUCHER: Usually what happens is we get the entire file and there's usually factual questions. Many of these cases, particularly under the Prison Litigation Reform Act, we don't see simply because they're not moved forward by a federal judge. They either failed to state a claim...the ones that I have tried though invariably whether before juries or with judges involve those factual question. Was it a serious medical need? Usually the jail has a physician that they rely on. Oftentimes the plaintiffs will have another physician. [LB467]

SENATOR CHAMBERS: But there are ongoing issues. It's not where a person says I had a toothache and I didn't get Tylenol or something. There is more to it than something like that in order for you to take it and litigate. Is that true? [LB467]

RICK BOUCHER: There is serious injury or death, Senator, yes. [LB467]

SENATOR CHAMBERS: And if the only thing you think is worthy of consideration is serious injury or death, then you don't understand what our responsibility to people who are in custody is. Our responsibility kicks in before serious injury or death occurs. And rather than be argumentative, Mr. Chairman, that's all that I would have. [LB467]

SENATOR ASHFORD: Thank you, Senator Chambers. Senator McDonald. [LB467]

SENATOR McDONALD: And I'm looking at this article that's written by the ACLU. And is this a correct statement that incarceration immediately results in termination of Medicaid? [LB467]

RICK BOUCHER: Well, I think that it can. Once you go through the...if it's not a county

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function it is a federal government function that once you come through the doors then counties are responsible for medical care. Yes, whether it's a heart transplant or a serious operation, whether dental or otherwise. So yes, once the jailhouse door closes, by statute, you as a Legislature have indicated that the county is responsible for the care. There have been some adjustments through the years to see if there are other providers, then they're responsible. But yes, the care question falls onto county government. And there is a controversy at the moment. If it is instituted by a city agency and the county is simply transporting them to a health care facility, is the city responsible or the county? So that issues is kind of, I think, winding its way through Lancaster County, at least, between the city, the county on that issue. But yes, I think it does. [LB467]

SENATOR McDONALD: So who ultimately then pays the medical bill when someone is in a county jail? [LB467]

RICK BOUCHER: The taxpayer. [LB467]

SENATOR McDONALD: The property taxpayer? [LB467]

RICK BOUCHER: The property taxpayer, yes. [LB467]

SENATOR McDONALD: In that community. [LB467]

RICK BOUCHER: Yes. [LB467]

SENATOR McDONALD: And regardless if that prisoner doesn't live there or have anything to do with being there, just that he did the crime in that area. [LB467]

RICK BOUCHER: Yes. [LB467]

SENATOR McDONALD: So then that county has to take on that burden. I can't see why they can't stay on the Medicaid. They're still eligible. What makes them not eligible? [LB467]

RICK BOUCHER: I think what happened...that's triggered by federal law as opposed to state law and I don't know the answer to that question. I know Senator Pedersen has, I think, LB666, which talks about all the federal aid programs while one is incarcerated, I think with an idea that once someone is released that those kick in right away. But I don't know the answer to that question. [LB467]

SENATOR ASHFORD: Yes, Senator Pedersen. [LB467]

SENATOR PEDERSEN: Thank you, Senator Ashford. Mr. Boucher, just a couple

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observations more so than questions. When we talk about an ombudsman coming in to investigate something we're not...the talk that we've had around the table and the questions has been all medical. There's a lot more things to investigate than medical claims. There's people who live in fear in there because they've been threatened maybe by other inmates and not had staff look at it and then things like that. Would you agree with that? I'm sure there's lots of incidents besides just medical. And it needs to be examined. The other one I have is just an observation of the fact that I don't understand why the sheriffs would be against having somebody come into their institutions and check out problems if they don't have any problems. [LB467]

RICK BOUCHER: Well what I would tell you that there are a couple of issues... [LB467]

SENATOR PEDERSEN: That's just an observation. [LB467]

RICK BOUCHER: Okay. [LB467]

SENATOR PEDERSEN: Thank you. [LB467]

SENATOR ASHFORD: Thank you, Senator Pedersen. Thanks, Rick. [LB467]

RICK BOUCHER: Thank you. [LB467]

SENATOR ASHFORD: How many testifiers do we have? One more? Okay, great. [LB467]

BETH BAZYN FERRELL: Chairman Ashford, members of the committee, for the record my name is Beth Bazyn, B-a-z-y-n, Ferrell, F-e-r-r-e-l-l. I'm assistant legal counsel for the Nebraska Association of County Officials. You'd have a long afternoon. I'd be happy to talk about why counties are opposed to the bill. Mr. Boucher has stated those reasons. But I'd be happy to try to answer any questions. [LB467]

SENATOR ASHFORD: Thank you. Any questions? [LB467]

SENATOR CHAMBERS: Just a couple that you may not be able to answer. We, on this committee, see sheriffs come here all the time to oppose bills. Why didn't they come to oppose this one? Why did they send a lobbyist instead of coming? [LB467]

BETH BAZYN FERRELL: I'm sorry, Senator. I can't answer that question. I don't know. [LB467]

SENATOR CHAMBERS: They would have had to answer some questions directly, wouldn't they? And maybe they chose not to be subjected to that kind of questioning, because a lot of them know that I have had specific complaints and Senator Pedersen

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and others. That could be a possibility. [LB467]

BETH BAZYN FERRELL: Yes, it could be. [LB467]

SENATOR CHAMBERS: But as far as you know there are not crime waves in all 93 counties which take their time right now? [LB467]

BETH BAZYN FERRELL: To the best of my knowledge, no. [LB467]

SENATOR CHAMBERS: Thank you. That's all I have. [LB467]

SENATOR ASHFORD: I guess I have it. I believe I was here when we started the ombudsman. I can't remember when that started, Senator Chambers. Was that in the eighties? I always view things like the Ombudsman's Office as a protection for all parties. I mean, I don't view it as an adversarial relationship. And you're not opposing this because you believe the ombudsman to be adversarial, right? [LB467]

BETH BAZYN FERRELL: Correct. [LB467]

SENATOR ASHFORD: It's just an added labor. [LB467]

BETH BAZYN FERRELL: It's an added layer. Yes. [LB467]

SENATOR ASHFORD: It's not that the ombudsman is not fair and impartial. Would that be correct? [LB467]

BETH BAZYN FERRELL: Yes, that's correct. Yes. [LB467]

SENATOR ASHFORD: Okay. That's all I have, thanks. Thank you. I guess I could tell myself that, since I'm the...it's you and me, Senator Chambers. (Laugh) Any other (laugh)...sorry. Any other testifiers? Okay. You wish to...Senator Chambers waives. LB475. [LB467 LB475]

SENATOR CHAMBERS: Mr. Chairman, members of the Judiciary Committee, those who have survived and endured, some of the members have to leave and it's not because of the nature of the bill, and for the people who have come here to speak on this bill, and they've been here a long time, somebody always must be last. And in order that they will understand how we operate, if it is a committee member's bill, usually those will be taken last because we are members of the committee, we'll be here. And I'm saying that so, because of the nature of the bill, nobody thinks that that is what led to this bill being taken up last. I discussed it with the staff and pointed out that since I'm a member of the committee it can be scheduled in this manner. It's one in which the people who are involved have sufficient interest to endure. And if any of them have

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been here in the past, they know that Judiciary Committees go a long time. This is a bill that is very thick and the bulk of that thickness is based on the fact that it changes the name of this operation that exists now from...well, I'll just go through the statement of intent. The bill does two things: It changes the name of the Fair Employment Practice Act to the Employment Nondiscrimination Act. That's the first thing. Then it prohibits employment discrimination based on sexual orientation. The bill is so thick because wherever that existing term "Fair Employment Practice Act" is found, the entire section where that word...that term is found has to be included in the bill. So there really is very little new operative material. This, for the record, the act applies to employers having 15 or more employees. If there are fewer than that, the bill does not apply, any of its provisions. However, if an employer has state contracts, it doesn't matter the number of the employees and the bill will apply in all of its parts. The act applies to state government, political subdivisions, agencies of the government, because they are the ones who should set the standard, should not discriminate on any basis. The front of the bill indicates that there will be a prohibition against discrimination based on marital status. In some parts of the existing laws that deal with nondiscrimination, marital status exists as one of the bases that cannot be used for discrimination. So in all of the places where that list of reasons which are prohibited as a basis for discrimination would exist, marital status is included because it should have been there, and some of these things are done piecemeal and it had not been. So the primary thrust of the bill is to prohibit discrimination based on sexual orientation. I'm going to read from the policy of the state so that I can get some succinct things into the record. And this is available for anybody to find. It is the policy of this state to foster the employment of all employable persons on the basis of merit, regardless of race, color, religion, sex, disability, marital status, or national origin, and to safeguard their right to obtain and hold employment without discrimination. Denying equal opportunity for employment is contrary to the principles of freedom, and is a burden on the objectives of the public policy of this state, unquote. Section 81-1356, subparagraph (1), declares, quote, equal employment opportunity means the right of all persons to work and to advance on the basis of merit and ability without regard to race, color, religion, national origin, age, sex, marital status, or physical or mental disability, unquote, and to this would be added sexual orientation. The statutes make it a hate crime to commit an offense against a person or a person's property because of sexual orientation, so the statutes acknowledge this already. The Nebraska Code of Judicial Conduct, Canon 3, subparts (5) and (6), requires judges to perform their duties without bias or prejudice based on sexual orientation, and to require lawyers and court personnel to refrain from manifesting such bias or prejudice in the courtroom. And to make it easy for you I added, and they are attached, these items, the statutory and from the Code of Judicial Conduct, so you can see where sexual orientation cannot be a basis for this kind of discrimination. There is one other place in the statutes where prohibition against sexual orientation discrimination exists and that relates to four entities that receive money from the Tobacco Tax Settlement: Creighton University, Boys Town Research Institute, the Nebraska medical institute or however...the Nebraska state med...the Medical Center, and the University of Nebraska.

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And I wanted to add that requirement and all four of them said they don't practice such discrimination anyway so they support it and it ought to be in the statute. Because I believe in these things I have no choice other than to offer a bill such as this and support it. All that I need to have made clear to me is that we're dealing with human being. Once that is established, every right, privilege, protection of a person should be extended and nobody should be discriminated against, especially in the area of employment, because of sexual orientation. And right now all there has to be is an accusation, a belief, gossip, and a person can be denied employment, can have his or her employment terminated, be denied a promotion, be discriminated against in any and every way, and that person has no recourse because under the state of the law in Nebraska such discriminations can occur. I have offered this bill several years running. I hope this is the last time I have to offer it. If you have any questions of me, I will answer them, but I would like to leave as much time as possible for the people who have come to have an opportunity make their points and get them into the record. [LB475]

SENATOR ASHFORD: Thank you, Senator Chambers, and I appreciate the work we did together on the hate crimes... [LB475]

SENATOR CHAMBERS: Yes. [LB475]

SENATOR ASHFORD: ...along with Senator Schimek, who made that all...made me look good when we got that bill passed. [LB475]

SENATOR CHAMBERS: Yes, she makes a lot of us look good. [LB475]

SENATOR ASHFORD: Thank you, Senator Chambers. How many proponents do we have for this bill? And opponents? Let's go with the proponents. [LB475]

MICHAEL GORDON: (Exhibit 17) Good very late afternoon, senators. Normally, I feel like a very discriminated person in a very small minority in Nebraska, but today I share something with every Nebraskan. I have a bad cold. I'm sorry. It's going to be kind of hard to hear me. I am Michael Gordon, that is G-o-r-d-o-n. I'm the executive director of Citizens of Equal Protection. We are a gay, lesbian, bisexual, and transgender advocacy group in Nebraska, and of course I'm here today in support of LB475. I've been working on this same piece of legislation in different numbers with Senator Chambers for the last eight years. Two years ago our organization hired the Nebraska Association of Sociological Behavior to conduct a nonbiased survey of 1,800 Nebraskans. They asked several questions regarding gay, lesbian, bisexual, and transgender civil rights issues. One question which is in the handout you just received is in regards to sexual orientation protection in the workplace. As you can see, citizens in each of the 49 legislative districts agreed, in a range of 53 percent to 82 percent, that we do deserve these protections. We conducted a similar poll way back in 2000 with about the same results. I have, in the years I've been involved with the GLBT civil rights

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movement, met countless people who have faced discrimination in the workplace. When they call our office and ask what I can do, I have no answer other than find a company that offers a protection policy. I personally think that's a little bit wrong because I don't think anybody should be limited to where they can find employment based on their sexual orientation. Now today you will hear from several individuals and representatives of other organizations in support of this bill. Who you may not hear from are the individuals who face the discrimination and ultimately been fired. You see, because just by being here today testifying, they can be fired from their jobs. And also, of course, remember a perceived sexual orientation is also a reason to be fired. Opposing testimony today will give you many reasons why this legislation is harming, not needed, or I'm sure a slew of other reasons. Please try and remember when they are testifying this is about protection of citizens in the workplace and sexual orientation should never be a factor in hiring or firing the right candidate. Now...and the other issue is, and I've been working a lot with economic development growth things in Omaha, I am from Omaha, I'm very proud of my city, I'm very happy to brag about it all the time, and there's a lot of discussion about how the message we send to people outside of Nebraska, now limited we are and how discriminating we are. I think passing legislation like this would go quite a long way to send a better message to the world. Thank you. I'll answer any questions you have. [LB475]

SENATOR ASHFORD: Thank you, Michael. Any questions of Michael? Thank you, Michael, for coming in this afternoon. [LB475]

LUCAS PETERSON: (Exhibit \_\_\_) Good afternoon, senators. My name is Lucas Peterson, that is L-u-c-a-s P-e-t-e-r-s-o-n. I am a member of the Nebraska LGBT Democratic Caucus, and I'm also a current state...Nebraska state democratic intern. [LB475]

SENATOR ASHFORD: Is that in party, Democratic Party? [LB475]

LUCAS PETERSON: Yes, the party. Thank you. [LB475]

SENATOR ASHFORD: Okay. (Laugh) [LB475]

LUCAS PETERSON: I'm a little nervous, so I'm sorry. [LB475]

SENATOR ASHFORD: (Laugh) No, that's fine. Just trying to put you at ease a little bit. [LB475]

LUCAS PETERSON: Okay. And I'm here behalf on representing the Democratic Caucus for today and we fully support this bill, and but we do have a concern that this bill does not go far enough as in terms of gender expression and identity. Now we do appreciate Senator Chambers' work for making workplace equality amongst employees

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who are diverse in their sexual orientation, albeit gay or straight. Unfortunately, I, myself, have been a victim of workplace discrimination. I am originally from the 3rd District of Nebraska, and then I became a resident of this area of the state where it's much more open and much more affirming. But it was this part of the state where I experienced my firsthand discrimination of being fired because I am an openly gay male. I used to work at a fast-food restaurant in Crete, Nebraska, because I am a Doane College student. I was there for quite some time and I was led to believe that my employment was fine until my...until the owner of the fast-food restaurant heard that I was an openly gay male and that conflicted with his deep Catholic roots. I believe that Nebraska totally needs this legislation because it will not only create an atmosphere in the workplace that is equal and understanding; it will also attract many of my peers from Lincoln, from Omaha, from all over the state to stay in the state, because a lot of my peers leave the state in order to find a place that is, well, a place that will accept them. Many...too many in Nebraska believe that by discriminating homosexuals, we will just leave. Too many in Nebraska think that we do not exist. There are...you're going to hear opponents of this bill saying that we might be innately evil or we might be morally wrong. However, I right now have my wrist band that says homophobia is a health hazard, and I just want to make that statement because homophobia is a health hazard. It's not only a health hazard. It is also wrong to discriminate me as a gay male. With that, I would like to thank you for hearing me out, and I hope that you have an enjoyable evening. So thank you. [LB475]

SENATOR SCHIMEK: Thank you very much. Are there any questions? Seeing none, thank you for waiting all afternoon. [LB475]

LUCAS PETERSON: No problem. [LB475]

SENATOR SCHIMEK: Next proponent. [LB475]

STEPHEN GRIFFITH: (Exhibit \_\_\_) Senator Schimek, senators, my name is Stephen C. Griffith, that's S-t-e-p-h-e-n G-r-i-f-f-i-t-h. I'm a minister at St. Paul United Methodist Church here in Lincoln. I'm here to testify in support of LB475. The United Methodist Church teaches our members that all persons are equally valuable in the sight of God and, therefore, certain basic human rights are due to all persons. The standard list of these rights repeated frequently in our social teaching and shared by many faith groups includes food, clothing, shelter, education, healthcare, employment, and others. Therefore, as a Christian and as a minister, not to mention as a citizen, I'm obligated to work for a society where each person has equal access to employment and other basic needs. Further, our teaching specifically commits us to support these rights for homosexual persons. We see this as a clear issue of simple justice. Now I say this not to suggest that you should follow our moral teaching and enact into law our particular understanding of morality, even if it is widely held. That's not the state's role. The state's responsibility is to ensure that all its citizens are treated fairly and justly and so I'm

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compelled, not only by my own faith and by my ordination as a minister but even more by my sensibilities and responsibilities as a citizen, to support this bill. I recognize that as a society we've not yet come to unanimous religious or moral agreement, but for me and for many equal justice and respect for the rights of all citizens are themselves moral values. To deny rights to some that most of us take for granted simply because of sexual orientation, because of who a person is, violates the fundamental values of our society. As a minister, I often counsel with...counsel homosexual persons who experience discrimination because of who they are. One man that I know holds a management position with a large employer here in Nebraska. Don, as I will call him, is very good at his job and is highly regarded by his coworkers and supervisors. But he confessed to me that he has to be careful. Only a few supportive people know he's gay and others in his workplace have said things that make it clear that if they knew they would have him fired. That's not right. A person shouldn't be fired simply because of who he or she is. This isn't a matter of special privilege. It's just a matter of simple justice and, for that matter, of common human decency and good sense. I've heard the argument that only a few people are gay or lesbian and there's no need for such a bill. Suppose, though, for the sake of argument, that only one person a year is discriminated against because of sexual orientation. That seems minor, but what if that one were your son or daughter or grandchild or brother or sister or your best friend? Wouldn't that be one too many? This bill isn't about an abstract category. It's about our own families and friends and neighbors. I thank Senator Chambers for introducing the bill. I urge you to send it to the floor and work for its passage. Thank you. [LB475]

SENATOR SCHIMEK: Thank you, Reverend Griffith. Are there questions? Seeing none, thank you. [LB475]

STEPHEN GRIFFITH: Thank you. [LB475]

SENATOR SCHIMEK: Next proponent. [LB475]

LAUREL MARSH: (Exhibit 18) Good afternoon. My name is Laurel Marsh, spelled M-a-r-s-h, and I appear here today on behalf of ACLU Nebraska, an affiliate of the American Civil Liberties Union, to support LB475, the Employment Nondiscrimination Act. This bill will guarantee that gay and lesbian workers are not discriminated against because of their sexual orientation, and this is not a new bill. As a state, we have failed to live up to our official motto of equality before the law. The current state of law in Nebraska is this: If you are gay or lesbian you can be openly and legally targeted for discrimination in employment, despite any knowledge, skill, ability, education or any other qualifications you might have. Now it's late in the afternoon and just for fun I've passed out an old Supreme Court case from the state of Wisconsin from 1875, and in it Ms. Lavinia Goodell asked to be admitted to the Wisconsin State Bar. There is no question raised concerning Ms. Goodell's training, her competency, or her character. And some other states at this time allowed women to be admitted to the practice of law.

Still, Lavinia is denied admission. Regardless of how flowery we find this language, and I apologize for the underlining, it was already on the case when I was...when I came across it, but in spite of how flowery we find the language, it's an employment discrimination case and it actually says, if you look at the second from the last page, that admitting a woman to the bar would be contrary to the laws of nature. So it's fun to read, it's...it comes from times that we think of as quaint, but what the Supreme Court of Wisconsin actually did, they actually chose to protect Lavinia from her own ability to earn a living. And what's not so quaint is the fact that we are still creating this type of barrier to employment for some people. The only thing that's changed is the label. Our members view LB475 as one that advances the Fourteenth Amendment's requirement that governments treat all citizens equally. We have evolved as a nation. We have moved to eliminate discrimination based on race, sex, religion, age, marital status, and other characteristics that are unrelated to the performance of work. We are at the point where we must now address this most open and legal form of discrimination--bigotry based on sexual orientation. Nebraskans collectively are pretty fair-minded. They know that such discrimination is occurring, and poll results that were presented to you by Michael Gordon demonstrate that Nebraskans do not believe people should be discriminated against in hiring decisions because of sexual orientation. The right to work is one of our most essential aspects of day-to-day life in American. LB475 simply ensures that people are treated without bigotry in the workplace and it makes possible the common-sense idea that we should be able to get our jobs and hold our jobs based on personal qualifications and abilities. And I truly hope that in another 132 years, if someone reads the testimony of this hearing, that they will look back on those quaint times when we discriminated against sexual orientation because of...in employment. And I would commend this bill to you and ask you to pass it on to General File. [LB475]

SENATOR SCHIMEK: Thank you, Laurel. Are there questions? Seeing none, I'd just like to comment you had to bring this at the end of the day to get us all stirred up, didn't you? (Laughter) [LB475]

LAUREL MARSH: It's just... [LB475]

SENATOR SCHIMEK: This is inflammatory. [LB475]

LAUREL MARSH: It's fun, but on the other hand it can rile you up, you're right. [LB475]

SENATOR SCHIMEK: Thank you, Laurel. Next proponent. [LB475]

TYLER RICHARD: (Exhibit 19) Good evening, Senator Schimek and other members of the Judiciary Committee. I want to thank Senator Chambers for again bringing this bill forward, I very much appreciate it, and to the entire committee for considering workplace equality an important consideration. I wish I could tell you that I didn't have any stories to share with you today, but I wouldn't be sticking around this late in the

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evening if I had nothing to say. I have many...been told of many tales of workplace discrimination, and I'd like to share a couple of them with you. A current college professor told me of two colleagues. I realize I didn't say my name. That is Tyler Richard. The last name is R-i-c-h-a-r-d. I apologize. A current college professor told me of two colleagues at a school, which included sexual orientation in that school's own nondiscrimination policy. One of the colleagues did not feel safe and did not feel the state was welcoming for transgender individuals and felt reprimanded and censored by a supervisor. The other colleague, in spite of the protections offered by this college, did not feel safe in the state and both of these colleagues have left. Another colleague of mine applied for a job as a sports editor for a town's local paper, and after sexual orientation was discussed on the verge of being offered the job, this colleague could no longer receive phone calls back from the prospective employer even to say this job is no longer on the table. Having worked as the lesbian, gay, bisexual and transgender student issues intern while a student at Nebraska Wesleyan, I can tell you, as was said before, there are a number of students who do consider leaving the state after they graduate. There are a variety of reasons why someone would leave behind family, friends, and their history in the state, but among these reasons should be because I want to feel safe, or because I want to work in a state where I can be assured that I'll have a job based on my qualifications. Those should be givens and, unfortunately, fear of discrimination has led to a number of students leaving the state and taking their college education that they received in this state with them. I also support expanding the proposed legislation to include gender identity and expression. The handout that you received is some educational information from the National Gay and Lesbian Task Force, and the National Center on Lesbian Rights regarding that language. The findings of a campus climate report that I did while working at Nebraska Wesleyan show that the students who identified as transgender have a significantly less quality campus experience than other students, and even if Wesleyan's own nondiscrimination policy was expanded to include gender identity or/and expression, these students are faced with a very tough decision--risk working for an employer who does not offer the same protections; or move, leaving friends and family behind; or, as a friend of mine looked at it, the possibility of moving to a state that recognizes the importance of a human being, not their transgender status. Of course, all these stories that I've said do deal with college-educated people who have the economic means to move out of the state for those protections. The people most at risk, as Michael Gordon has mentioned earlier, are people who need their jobs for their most basic needs and who have the risk of being fired and not being able to provide food if they reveal their sexual orientation or gender identity. At this point in time, I would like to open it up for any questions that you have for me. I do thank you very much for your attention to this matter this evening. [LB475]

SENATOR ASHFORD: Any questions? Thank you for coming. [LB475]

TYLER RICHARD: Thank you very much. [LB475]

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SENATOR ASHFORD: Next proponent. [LB475]

DEREK ROBINSON: (Exhibit 20) Hello, my name is Derek Robinson, D-e-r-e-k R-o-b-i-n-s-o-n, and I am here as a representative for the Queer Student Alliance at the University of Nebraska-Lincoln. I'm just coming to support my bill...support this bill. I come here from out of state and I come from Massachusetts, where I cannot be discriminated against in the workplace, and just by being here tonight endangers my job opportunity once I graduate from the university by staying in this state. And I have made a life here, I have friends here. And without this bill being passed, it makes me really want to leave and go back to a place where I can keep my job, depending on my sexual orientation, whether it be straight or gay. Like I said, just by being here, just by being questioned, I could lose my job. I also...everyone in our community, in the QSA, feels the same way. It has been mentioned before that there are many students who consider leaving the state because they fear losing their job that they have worked so hard for, that they completed all their years in middle school, high school, graduate, undergraduate, and just because something that they've had all their life, who they are, they can lose their job. And all this has been said before. I just wanted to help keep it strong. So thank you for your time. Do you have any questions? [LB475]

SENATOR ASHFORD: Thank you for sharing it with us, your testimony. [LB475]

DEREK ROBINSON: Oh, thank you. [LB475]

SENATOR ASHFORD: Thanks. Other proponents? Opponents? How many opponents do we have again? Okay. We'll need a first opponent. [LB475]

RICHARD CLEMENTS: My name is Richard Clements, C-l-e-m-e-n-t-s. I'm an attorney in Elmwood, Nebraska, also a banker and an employer. I would like to begin by saying that I want respect and compassion to be shown to all persons in the state regardless of their personal views of actions. At the same time, I wish to have an equal desire to express my ideology, even if it differs with those individuals. I'm here to ask the committee to vote against advancing LB475 for the following reasons. The first reason I would address would be the constitutional concerns I have. As you know, the United States Constitution states that Congress shall make no laws respecting the establishment of religion, or prohibiting the free exercise thereof. And the Constitution of the State of Nebraska, in the Preamble, it states, "We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights and frame of government, as the Constitution of the State." Section 4 of that of that constitution states, and I quote, "All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences." No person shall be compelled to support any place of worship, nor shall any interference with the right of conscience be permitted. I continue: Religion, morality, and knowledge are

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essential to good government, end quote. My opinion is that LB475 violates both the federal and Nebraska Constitutions by attempting to restrict the free exercise of religious views, and interferes with the rights of conscience that is mentioned in the Nebraska Constitution, the rights of the conscience of employers in the state. It's my view that the Nebraska Constitution would need to be amended prior to making this bill constitutional. The Nebraska Constitution mentions the word "morality" and when it states that morality is essential to good government, it's my view that constitution is referring to moral absolutes and boundaries that don't change over time. This bill is intended to predominantly benefit or protect behaviors of individuals and emotions, and it seems to me that the bill seeks to protect things that fall outside the boundaries of the definition of morality in the constitution. My view is, like good parents, good government does not strive to protect all behavior of its citizens, but should strive to protect them from the behavior which has been proven to lead to increased health risks. This bill, seems to me, would create special rights for some person and criminalizes the speech and religious views of employers, such as myself. Thank you. Do you have questions? [LB475]

SENATOR ASHFORD: Thank you, Richard. Any questions of Richard? Thank you. [LB475]

EDWARD STRINGHAM: (Exhibit \_\_\_\_ ) My name is Edward Stringham, that's E-d-w-a-r-d S-t-r-i-n-g-h-a-m. I'm a licensed psychologist. I'm a member of the American Psychological Association, the Nebraska Psychological Association. I have come today to present testimony in opposition to LB475. This legislation will not benefit Nebraska because it would create a confusing legal mechanics, because it focuses on issues which, by and large, are not problems and because it fails to address the real problems faced by gays in our society. First, experts, especially psychologists, are increasingly reporting that it's impossible to define sexual orientation in a meaningful way. John Dececco, who himself is gay, editor of the Journal of Homosexuality, stated that there is, quote, underlying theoretical confusion about the term. The December 2006 edition of the Harvard Mental Health Letter, which I have right here, describes this confusion. I quote: "Sexual orientation can be defined by romantic or sexual attraction or arousal; by sexual activity or behavior; or by identity, that a person regards herself or himself as homosexual or heterosexual." Cornell's Ritch Savin-Williams, who by the way is also gay, presented at UNL last March that the proportion of the population which is gay varies from 2 percent to nearly 25 percent, depending upon which definition is used. I ask you, what risks do we run when ambiguous terms are codified into our laws? How can legislation be meaningful if we do not know to whom it's applicable? What misinterpretations or even abuses could result? Second, the need for this legislation is questionable because gays are doing well in the American workplace. A 2001 study by Syracuse University found that gay households on average had incomes that were 60 percent above the national mean. That's incredible. Rich Tafel, leader of the gay group the Log Cabin Republicans, states, quote: I can tell you anecdotally as I travel all over

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the country I almost never hear from anyone who was fired because they were gay. Eighty percent of Fortune 500 companies already have policies in place guaranteeing fairness in hiring practices with gays. Clearly, gays are doing well economically and do not appear to bear the ill effects associated with employment discrimination. Third, this legislation will likely hurt employers that have conflicts of conscience with homosexual behavior or expression. Religious affiliated nonprofits, churches, and small businesses would be vulnerable to legal harassment if fulfilling their missions meant they should not hire homosexual persons. If accused, even those firms that already ban discrimination could be subject to government investigations and legal costs. What problems with business climate or even First Amendment conflicts could result? And finally, the worst feature of this legislation is that it fails to address the real problems gays face. After 27 years of counseling homosexuals, I am convinced that one of the most compelling problems is that of social alienation. Better jobs and statutory reforms in many states and cities have not delivered the acceptance gays crave, and the international research to date gives no reason to believe that any other nation has found a legal mechanism that can alter the social environment in a manner gays find satisfying. Sometimes we have to admit that the changes we desire cannot be instituted by the passage of laws. Thank you for this opportunity to testify. [LB475]

SENATOR ASHFORD: Any questions? Yes. [LB475]

EDWARD STRINGHAM: Yes. [LB475]

SENATOR SCHIMEK: I just have one. What's a Log Cabin Republican? [LB475]

EDWARD STRINGHAM: That's a group within the Republican Party which is comprised... [LB475]

SENATOR ASHFORD: I can fill you in later on that, being one. (Laugh) [LB475]

EDWARD STRINGHAM: ...of gay individuals. [LB475]

SENATOR SCHIMEK: I'm sorry. I missed your answer. [LB475]

EDWARD STRINGHAM: Okay. [LB475]

SENATOR ASHFORD: Oh, I'm sorry. No I was being facetious. Go ahead and answer the question. [LB475]

EDWARD STRINGHAM: Okay. That's a group within the Republican Party of gay-identified individuals. [LB475]

SENATOR SCHIMEK: But why do they call themselves that? [LB475]

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EDWARD STRINGHAM: You know, I don't know. [LB475]

SENATOR SCHIMEK: Okay. [LB475]

EDWARD STRINGHAM: That's a great question. I would think it might have something to do with Lincoln, but I don't know. I don't know, Senator. I'm sorry. [LB475]

SENATOR SCHIMEK: Okay. Thank you. [LB475]

SENATOR ASHFORD: Excuse me for interrupting, Senator Schimek, I'm sorry. I just felt I would be qualified to answer that. I don't know. But let me ask one and here... [LB475]

EDWARD STRINGHAM: Sure. [LB475]

SENATOR ASHFORD: ...let me...let me...it's late and I know everybody would like to proceed along, but, you know, I'll give you 90 percent of what you said and that employment is better, that jobs are more prevalent for gay people. Here is the part that disturbs me about what, as policymakers, we should do, and it...and there is a debate about behavior versus... [LB475]

EDWARD STRINGHAM: Yes. [LB475]

SENATOR ASHFORD: ...other. I understand all of that. But it's clear from history that gay people have lived in our...in the world for as long as the world has been there. I mean it's written about in ancient times and so it's there. It's not...and if it's...whether it's a behavior or not a behavior, whatever it is, when I sponsored the hate crimes bill here, you know, when I was in the Legislature before, here's what bothers me. Up to...when the thought about someone being gay and not liking them is you can think whatever you want to think, and it's a free country, and I don't think people should be harassed or prosecuted or sued because they have a thought about somebody. But when I did the hate crimes bill my concern was, when that thought or that feeling that may...essentially translates into an act that injures another person, because they are gay, not for any other reason, for any other reason, whether or not it's a behavior or whether it's innate or whether you're born with it, I don't care, if it's for any...if that's the reason, if a particular person is not being attacked but...because someone doesn't like them, but they're being attacked because they're gay and/or in the workplace when someone is...when it's clear that they're being discriminated against, and I realize there are fuzzy cases, but where someone says I just don't like gay people and they're gone, and I realize that's maybe the rare case, I have a hard time from a policy perspective understanding why we don't protect against that because it's an injurious act that's hurting people. And I, you know, I understand employers wanting the freedom to hire

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whom they want and for the most part I agree with that, you know, that people should hire who they want to hire, but when someone is hurt because they...whether it's a behavior or whether they're born with it, with this feeling or the sexual orientation, I don't care, I don't want to debate that issue. What I...I just don't want people hurt because they don't like gay people. I mean that, to me, is just...just drives me stark raving mad, and I don't know how to...I don't know what to do about that, but I mean, you know, I'm a Christian, too,... [LB475]

EDWARD STRINGHAM: Yeah. [LB475]

SENATOR ASHFORD: ...and I don't like people being hurt because...and I'm not...and I'm...this is in all deference to your beliefs here... [LB475]

EDWARD STRINGHAM: Yeah. [LB475]

SENATOR ASHFORD: ...and your thoughts, and I understand what you're saying, but when someone is injured because of their sexual orientation, I don't want to get into a debate about how they got that sexual orientation. I don't care. And that's what bothers me, and that's why I offered the hate crimes bill and I'm proud it passed in Nebraska because I think it has helped. We haven't had the kind of incidents in Nebraska that we...like the Wyoming case where the young man was dragged by a car throughout the country and killed. So I guess what I'm...this is not a question and I'm not...I'm picking on you, but I don't mean to. [LB475]

EDWARD STRINGHAM: I don't feel picked on, Senator. [LB475]

SENATOR ASHFORD: But I just...it just, when we get to this issue, I don't care if it's 1 case out of 10 million... [LB475]

EDWARD STRINGHAM: Uh-huh. [LB475]

SENATOR ASHFORD: ...in America, if somebody is injured because they are gay, that bothers the bejesus out of me. [LB475]

EDWARD STRINGHAM: Yeah. [LB475]

SENATOR ASHFORD: I mean I...and I don't know how else to say it. [LB475]

EDWARD STRINGHAM: May I respond? [LB475]

SENATOR ASHFORD: Yeah, you can. [LB475]

EDWARD STRINGHAM: I mean I'm in sympathy with what you're saying. [LB475]

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SENATOR ASHFORD: Okay. (Laugh) [LB475]

EDWARD STRINGHAM: I mean I hate to see people hurt, and that includes people who are gay or... [LB475]

SENATOR ASHFORD: I'm sure you do. [LB475]

EDWARD STRINGHAM: ...transgender or whatever. [LB475]

SENATOR ASHFORD: I'm sure you do. [LB475]

EDWARD STRINGHAM: And I hope that this...these gentlemen who spoke today don't leave the state because of whatever the climate issues. So I agree with that. And frankly, I think it comes down to a couple things: What can we do with a law? Will a law really help? And will the law...is there a potential the law could create new problems that we don't have? [LB475]

SENATOR ASHFORD: A law can always create new problems because what you can get is an overproliferation of lawsuits, all those things. [LB475]

EDWARD STRINGHAM: Yes. [LB475]

SENATOR ASHFORD: And you can have a...I know everybody wants to go, but (laughter) but you can...but this really...I mean, this is something I worked on for a long time when I was in the Legislature. [LB475]

EDWARD STRINGHAM: Sure. [LB475]

SENATOR ASHFORD: And I took a lot of criticism for doing it, and I believe sincerely I was doing the right thing and it's because I get to the point where I understand what you're saying,... [LB475]

EDWARD STRINGHAM: Yeah. [LB475]

SENATOR ASHFORD: ...I understand what you're saying, I just cannot stomach in a...we spent today talking about a situation where people are injured on the Internet, children are injured on the Internet. [LB475]

EDWARD STRINGHAM: Uh-huh. Yes, I was here for... [LB475]

SENATOR ASHFORD: They're injured. They're injured. They're harmed, so we're going to...we're looking at passing a law to try to prevent that harm. It's because they're

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children. And I realize that that's a little...that's a different situation because gays are children too. I understand all that. But I...but I just don't like people being injured and I don't know how else we...I don't know how else to do it other than to say don't injure people because they're gay. [LB475]

EDWARD STRINGHAM: Yeah. I guess...may I respond? [LB475]

SENATOR ASHFORD: Yeah. [LB475]

SENATOR CHAMBERS: Not for too long. (Laughter) [LB475]

EDWARD STRINGHAM: Okay. [LB475]

SENATOR ASHFORD: I'm sorry, Senator Chambers, but it's... [LB475]

EDWARD STRINGHAM: All right. Well, I don't need to, but... [LB475]

SENATOR ASHFORD: I just wanted that...that's my concern. Thank you. [LB475]

EDWARD STRINGHAM: Okay. Well, thank you for listening. [LB475]

JIM CUNNINGHAM: (Exhibit 21) Senator Ashford and members of the committee, for the record, my name is Jim Cunningham and I'm appearing in my...that's C-u-n-n-i-n-g-h-a-m. I'm appearing in my capacity as executive director of the Nebraska Catholic Conference and I am testifying on behalf of the conference in opposition to LB475 and I want to explain the reason. What I have submitted for your attention and consideration are copies of Section 36 from LB759, introduced by Senator Chambers in 2005. In addition to LB759, in each of several prior years that this proposed change in public policy has been introduced as legislation, this particular provision was in the legislation. It is not in this bill, LB475, and on that basis the Nebraska Catholic Conference stands opposed to this bill. Our view is that... [LB475]

SENATOR CHAMBERS: Mr. Cunningham, I want to cut to the chase. I'm going to read for you a proposed amendment. It's labeled AM399, an amendment to LB475. Did you and I have a discussion about this yesterday? [LB475]

JIM CUNNINGHAM: We did. [LB475]

SENATOR CHAMBERS: Do you have a copy of what you handed out to us? You might recognize this. Let me read it. [LB475]

JIM CUNNINGHAM: Probably not. Yes, I do. [LB475]

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SENATOR CHAMBERS: Let me read this to you. [LB475]

JIM CUNNINGHAM: This is something different than what I handed out? [LB475]

SENATOR CHAMBERS: This is a proposed amendment that I have. [LB475]

JIM CUNNINGHAM: Okay. [LB475]

SENATOR CHAMBERS: Section 37, insert the following new section: "Provisions of the Employment Nondiscrimination Act which prohibit discrimination based on sexual orientation shall not apply to any bona fide religious organization, which organization shall include any religious corporation, organization, association, or society or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious corporation, organization, association, or society." [LB475]

JIM CUNNINGHAM: Appears to me to be word for word what has been in the bill, in all of the prior bills up to this year. [LB475]

SENATOR CHAMBERS: If this amendment is offered, what becomes of your opposition? [LB475]

JIM CUNNINGHAM: We are no longer opposed to the bill. [LB475]

SENATOR CHAMBERS: I'll save us both time because I'm going to offer it. [LB475]

SENATOR ASHFORD: We'll accept it. [LB475]

JIM CUNNINGHAM: I have a lot of other things I could offer. (Laughter) [LB475]

SENATOR CHAMBERS: Quit while you're ahead. [LB475]

JIM CUNNINGHAM: Would you believe me if I told you I said a little prayer on the way up here that... (Laugh) [LB475]

SENATOR ASHFORD: This is getting to be... [LB475]

SENATOR CHAMBERS: I'll believe you, but we won't go into length...discussion now. [LB475]

SENATOR ASHFORD: Thanks, Jim, very much. [LB475]

JIM CUNNINGHAM: Thank you very much. [LB475]

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AL RISKOWSKI: (Exhibit 22) I am Al Riskowski. It's...Riskowski is R-i-s-k-o-w-s-k-i, executive director of Nebraska Family Council. I won't read too much of what I prepared here just because there were three pastors who were here earlier who had hoped to testify and maybe just give a little bit of what they were thinking of stating, in that two of them were from some of our largest churches here in the state of Nebraska, that their concern is, once again, you're setting up the government as setting the religious or maybe I should say moral values in regard to sexual behavior. And in this case the government is attempting to set that standard, whereas it has always been the religious community, sometimes in dialogue with each other and sometimes in opposition, but nevertheless it has been the religious community who has attempted to set the moral parameters as far as sexual activity. One thing that I put here I'd like to read is that Martin Luther King Jr. stated a person should be judged by the content of their character, not by the color of their skin, and obviously race does not tell us anything about one's character. However, your sexual lifestyle of a individual does indicate character. [LB475]

SENATOR CHAMBERS: Mr. Riskowski,... [LB475]

AL RISKOWSKI: Yes, sir. [LB475]

SENATOR CHAMBERS: ...are you suggesting that Martin Luther King holds the view you hold toward gay and lesbian people? Is that what you're quoting him for? [LB475]

AL RISKOWSKI: I am quoting him because character is involved here, not just race. [LB475]

SENATOR CHAMBERS: But he was a black man. Are you suggesting that your opinion is that Martin Luther King holds the opinion you're expressing about gay and lesbian people? Is that what you meant by quoting him? [LB475]

AL RISKOWSKI: Sir, I believe he would agree with me. [LB475]

SENATOR CHAMBERS: He would not. You don't know what you're talking about. And people have appropriated and misappropriated the name of Martin Luther King down through the ages any time they had some crackbrain notion that they wanted to try to legitimize by quoting Martin Luther King, and they don't know anything about him whatsoever. So I want to make it clear that what you are saying here today is not representative of what Martin Luther King was about. [LB475]

AL RISKOWSKI: Senator, I would disagree with you... [LB475]

SENATOR CHAMBERS: Well, you can disagree. [LB475]

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AL RISKOWSKI: ...because I have read some of his... [LB475]

SENATOR CHAMBERS: Make your statement. I want that in the record. [LB475]

AL RISKOWSKI: I will. I have read some of his writings, as well. [LB475]

SENATOR CHAMBERS: Go ahead and make your statement, but you're speaking for yourself, not Martin Luther King. I want that clear. [LB475]

AL RISKOWSKI: Yes. All right. Yes, I'll be glad to do it, because I've read some of his writings as well, and I... [LB475]

SENATOR CHAMBERS: Well, go ahead and make your statement. [LB475]

AL RISKOWSKI: All right. Also in the bill on page 29, Section 12(9)(c), that's existing language that's in the bill, disability, it says, does not include homosexuality, bisexuality, transvestism, and I put in, if you need a definition of those terms I put in the definition of those terms, transsexualism, pedophilia, exhibitionism, voyeurism, gender-identity disorders not resulting in physical impairments, and other sexual behavior disorders. The problem we have within this bill is that there is no definition of sexual orientation. And when this type of legislation is incorporated the definition gets so wide, as I have seen that happen in various places, that it becomes so inclusive it creates great difficulty in the workplace. An example would be in a case that I'm very much aware of. An individual, who was a man for many years in the workplace, all of a sudden decided he was a woman and came dressed as a woman and went into the women's rest room to use it, and a lawsuit ensued in regard to that. Well, sexual orientation was what he used to protect himself in regard to this. So since there is no real definition, it gets so wide, so inclusive, we are not really talking about homosexuality here. In my estimation we're talking about a wide variety of sexual activities that can be included. The other point that I'd just like to make is that in the Civil Rights Act of 1964 there were three points used to create a protected class, and of course there had to be a widespread problem to create special legislation to create a class. This is a very difficult class, of course, to get your arms around. I listed the three requirements that are there. I will not take the time to read that, but I'll just conclude with this. This type of legislation would be a comprehensive rewrite of Nebraska law. This type of legislation would place the government in conflict with the religious community. The government would become the standard for sexual moral behavior instead of religion. This bill actually legislates sexual immorality, and I ask the Judiciary Committee to allow this far-reaching bill to fail in committee. Thank you. Any questions? [LB475]

SENATOR ASHFORD: Thank you. Any questions? Thanks for coming. [LB475]

AL RISKOWSKI: Thank you. [LB475]

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DON KOHLS: My name is Don Kohls, K-o-h-l-s, and I'm speaking on my own behalf. For over 16 years, I have chaired an organization called...goes by the name of Omaha for Decency that specifically deals with the issue of pornography. As a result I have become very aware of the many forms of sexual orientations and preferences that we humans can involve ourselves in. This bill is extremely troubling to me because I believe it opens the doors to sexual behaviors that are not only bizarre but in some, at least at this point, are illegal. I am also very concerned that the state may become the moral arbiter in deciding which sexual behaviors are acceptable and which are not for its citizens. If this is so, then all our religious liberties are indeed in jeopardy. Sexual immorality, no matter what venue it comes in, is harmful to us all. It is the prime reason I'm opposed to this, to bills of this nature. Nature's law has always meted out to us consequences when we change its design. The greater the design change, the greater the consequences. Our Creator warned us throughout human history that when we change His definition of truth and love, we learn the ability to discern right from wrong--a tremendous tragedy for the well-being of any society. In closing, our Creator's design for a man and a woman is a lifelong monogamous union which has never changed. It's tragic and unfortunate, however, that many make other choices that rob them of His very best for us. Thank you for considering my serious concerns. [LB475]

SENATOR ASHFORD: Thank you, Don. Any questions? Senator Schimek. [LB475]

SENATOR SCHIMEK: Just a quick one. You said you were representing yourself, but you mentioned some organization that you've been working with and it was not very...we couldn't hear it. It's wasn't very audible. [LB475]

DON KOHLS: Okay. It's Omaha for Decency. [LB475]

SENATOR SCHIMEK: Okay. Thank you. [LB475]

SENATOR ASHFORD: Any questions of Don? Thanks, Don. Any other opponents? Neutral? Opponents? Do you waive closing, Senator Chambers? [LB475]

SENATOR CHAMBERS: (Exhibit 23) No, I have a few words to say. I would like a copy of these amendments handed out. I find it disgusting, reprehensible when bigots of any stripe or variety want to use the name of Martin Luther King to justify and legitimate all types of hateful, disgusting notions that they have in their disordered minds. This bill is not unconstitutional. This bill addresses a very real problem. What that man who misused Martin Luther King's name does not understand, and some of the other opponents of this bill, is that sexual orientation is clearly understood because they came here speaking against it, so they know what it means. The Nebraska Supreme Court, which would be the final arbiter or any case, uses the term "sexual orientation" in its Code of Judicial Conduct without a definition. The hate crimes law, which has been on

the books for years, and the same in other states does not define the term. That provision of law that I mention, dealing with these entities that cannot discriminate on the basis of sexual orientation, understood what it meant during the discussion, said they do not practice that and they supported it. When these kind of off-the-wall people want to say that a term is not understood, they are totally disconnected from reality and they have no real argument. I'll tell you what I believe. Any person has the right to be respected and treated with the respect that all these self-righteous, pious hypocrites want for themselves, and I will always do everything I can to ensure that those people who are marginalized, who are animalized, who are demeaned and debased will have somebody who will speak for them. The person most maligned by them, though, is somebody named Jesus Christ, who never condemned anybody for sexual anything, even when a woman was brought to him who supposedly was caught in the act of adultery. He didn't condemn her. He made fools out of the self-righteous hypocrites who brought her there, and he wrote something in the ground and they all left. Why do you think Jesus may have reacted like that? Because he was a child born out of wedlock and he heard the insults when he was growing up. When he was a grown man, the religious leaders said, we know who our father is. That was a direct reference to the fact that his mother and father were not married when he was born. And people were as hateful then as they are now. Whatever the equivalent of bastard was, that's what he was called. And I'm sure he may have seen reflections and heard echoes of things that had been directed against his mother when these hypocrites brought the woman but not the man. So let these people come here and expose what they are with their own mouths, so they can show you with whom you are in league, and ask yourself this question: If you had a relative...and we've had some senators here who ask me, they beg me, don't mention the fact that they have relatives because they're afraid to take a position and they're embarrassed. And I said the very fact that you, the parent, will have this attitude toward your own child, that should let you know why people are reluctant to acknowledge their gay orientation. If their own family does not understand, if they go to work and hear the vicious jokes, horrible statements made by people who call themselves Christians, why should they subject themselves to that? Then these pious hypocrites want to come here and say everything is better for them. Would you want to be called a fagot, a fruit, a fairy, queer? And they want to tell us how good these people have got it? I think for my part that is the definition of insanity. There has been dissociation in those people, and the man who claims to be a psychologist knows what the word "dissociation" means, not disassociation, dissociation. And if I seem very indignant, I am. Whenever those who feel that they have power will combine to oppress those who they know are vulnerable, it's the worst thing that can happen. And while I'm in this Legislature, I will do everything I can to prevent any human being from feeling like they have to say what the religious hypocrites of yore made people say if they had leprosy--unclean, unclean. They don't want to be called that. Let them worship where they want to and do what they want to, but they want to deny other people the right to live in peace and find some serenity, a feeling of self-respect. And if there's anything that Christianity supposedly teaches, if there's anything that democracy supposedly

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means it should go to the intrinsic worth and dignity of every human being. That's what I believe, even though I've come to learn these things through their not being applied to me and mine. But what that has done to me is to sensitize me to everybody who is mistreated. I will never be a Christian. I will never be a religious person of any stripe, because religion makes people narrow, it makes them hateful, it makes them judgmental, it makes them condemnatory to the point where they say a person doesn't have the right to have a job and earn a living. That's all that I have to say. But I wanted that amendment to be formally offered by me during our proceedings. [LB475]

SENATOR ASHFORD: It is accepted. Thank you, Senator Chambers. [LB475]

SENATOR CHAMBERS: Thank you, Mr. Chairman. [LB475]

SENATOR ASHFORD: Okay. (See also Exhibits 14, 15, and 16.) [LB475]

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Disposition of Bills:

LR4CA - Held in committee.  
LB107 - Advanced to General File.  
LB142 - Advanced to General File, as amended.  
LB246 - Advanced to General File, as amended.  
LB467 - Advanced to General File, as amended.  
LB475 - Advanced to General File.  
LB639 - Advanced to General File, as amended.

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Chairperson

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Committee Clerk