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Floor Debate
March 24, 2009

[LB121A LB122 LB139 LB260 LB292 LB328 LB342 LB355 LB457 LB483 LB517 LB547
LB547A LB548 LB555 LB561 LB603A LB603 LB679 LR50]

SENATOR ROBERT PRESIDING []

SENATOR ROBERT: Good morning, ladies and gentlemen. Welcome to the George W. Norris Legislative Chamber for the forty-ninth day of the One Hundred First Legislature, First Session. Our chaplain for today is Pastor Fay Hubbard of the Ellis/Odell United Methodist Church in Odell, Nebraska, Senator Wallman's district. Please rise. []

PASTOR HUBBARD: (Prayer offered.) []

SENATOR ROBERT: Thank you. I call to order the forty-ninth day of the One Hundred First Legislature, First Session. Senators, please record your presence. (Visitors and doctor of the day introduced.) Mr. Clerk, please record. []

CLERK: I have a quorum present, Mr. President. []

SENATOR ROBERT: Are there any corrections for the Journal? []

CLERK: I have not corrections. []

SENATOR ROBERT: Are there any messages, reports, or announcements? []

CLERK: Mr. President, your committee on Enrollment and Review reports LB548 as correctly engrossed. Enrollment and Review also reports LB328, LB292, LB603, LB603A, LB547, LB547A, and LB121A to Select File, some of which have Enrollment and Review amendments attached. Government, Military and Veterans Affairs Committee chaired by Senator Avery reports LB139 to General File with amendments. And I have an appointment letter from the Governor to Commission of Industrial Relations. That's all that I have, Mr. President. (Legislative Journal pages 813-817.) [LB121A LB139 LB292 LB328 LB547 LB547A LB548 LB603 LB603A]

SENATOR ROBERT: Thank you, Mr. Clerk. We will now proceed to first item on the agenda, legislative confirmation report. []

CLERK: Mr. President, the Health and Human Services Committee reports on two appointments to the Board of Emergency Medical Services. (Legislative Journal page 817.) []

SENATOR ROBERT: Senator Gay, you're recognized to open on the report. []

SENATOR GAY: Thank you, Mr. President. The Health and Human Services

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Committee reports favorably on the appointment of two persons to the Board of Emergency Medical Services. Both appointees were approved unanimously by the committee. Dr. Theresa Hatcher is a new appointment for a three-year term from Bellevue. Her public hearing was on the twenty-seventh to consider her appointment. She is a emergency physician at Alegent Immanuel Hospital at Omaha. She received her undergraduate degree at Walsh College in Canton, Ohio, and her medical education at Ohio University. She also completed family practice residency at Creighton University. And I know Dr. Hatcher personally. She had served on the Bellevue council for I think eight years, so. Mr. Troy Hiemer is a new appointment for a three-year term. The public hearing was held on March 4 to consider his appointment. He's an EMT intermediate and statewide communication manager for Midwest Medical Transport in Columbus. He is the current vice president of the Columbus Fire Board and a U.S. Marine Corps veteran. Thank you, Mr. President. []

SENATOR ROBERT: Thank you, Senator Gay. Members, you have heard the opening on the confirmation report. Are there members wishing to speak? Senator Stuthman, you are recognized. []

SENATOR STUTHMAN: Thank you, Mr. President and members of the body. I truly support these confirmation individuals, especially, you know, the one from the Columbus area. This is a new appointment for the individual, Troy Hiemer, and I think he's very qualified for this position. And I do support that and would ask the members of the body to support these confirmations. Thank you, Mr. President. []

SENATOR ROBERT: Thank you, Senator Stuthman. Seeing no other lights on, Senator Gay, do you wish to close on the appointment? []

SENATOR GAY: I'll waive. []

SENATOR ROBERT: Senator Gay waives closing. Members, the question before the body is, shall the report from the Health and Human Services Committee be adopted? All those in favor vote yea; opposed vote nay. Have all those voted who wish? Mr. Clerk, please record. []

CLERK: (Record vote, Legislative Journal pages 817-818.) 41 ayes, 0 nay, Mr. President, on adoption of the report. []

SENATOR ROBERT: The report is adopted. Next item on the agenda, General File. []

CLERK: LB355, Senator Lautenbaugh's bill, relating to cigar bars. The bill was discussed yesterday, Mr. President, at that time Senator Karpisek...Senator Lautenbaugh reopened on his bill. Senator Karpisek reopened on the committee amendments. Senator Wightman offered AM827 as an amendment to the committee

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amendments, Mr. President. (AM445, Legislative Journal 580; AM827, Legislative Journal page 810.) [LB355]

SENATOR ROBERT: Senator Lautenbaugh, you are recognized to reopen on LB355. [LB355]

SENATOR LAUTENBAUGH: Thank you, Mr. President, members of the body. Briefly, I think we had a good discussion yesterday on LB355. With the current amendment of Senator Wightman's that we're debating the bill would allow entities that obtain 10 percent of their revenue from the sale of tobacco, other than cigarettes, to operate with as a cigar bar with a walk-in humidor and not sell food on the premises. I think this is a minor, narrow, justifiable exception to the Clean Indoor Air Act. And I would urge your support. [LB355]

SENATOR ROBERT: Thank you, Senator Lautenbaugh. Senator Wightman, will you reopen on AM827. [LB355]

SENATOR WIGHTMAN: Thank you, Mr. President, members of the body. AM827 is a substitute amendment from a previous amendment, AM805 I believe. It provides that in order to qualify as a cigar bar, and all of it goes to the definition of cigar bar as provided in LB355, provides that they cannot serve food products, that they have to have 10 percent...the original bill called for 15 percent from cigarettes, cigars, tobacco products. AM827 seeks to narrow the exception a great deal because 10 percent of their revenues, the establishments revenues have to come from the sale of cigars and cigar-related products. My whole purpose in the amendment and in the earlier amendment that I had, AM805, was to narrow substantially the exception. Because if they could sell cigarettes, they could sell cigarettes by the carton and the case at a very low rate and perhaps qualify. It is truly my belief that only four or five probably businesses within the state of Nebraska are going to be able to qualify. I think there's only two or three at the present time. I did not want to limit it, however, to current establishments. I think that's a closed class and it's dangerous legislation. So I urge the body to support AM827. Thank you, Mr. President. [LB355]

SENATOR ROBERT: Thank you, Senator Wightman. Members, you have heard the opening to AM827, the amendment to the committee amendments. Those wishing to speak are Senators Gay, Howard, Stuthman, and Carlson. Senator Gay, you are recognized. [LB355]

SENATOR GAY: Thank you, Mr. President. Would Senator Lautenbaugh yield to a few questions. [LB355]

SENATOR ROBERT: Senator Lautenbaugh, will you yield to a question from Senator Gay? [LB355]

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SENATOR LAUTENBAUGH: Yes, I will. [LB355]

SENATOR GAY: Thank you, Senator Lautenbaugh. Senator, on this amendment I was...I told you earlier, I did like the amendment where cigarettes are just out. Now they're back in on this amendment. And I have a question though. Earlier on the first day I asked exactly how the Liquor Control Commission would go and review these applications. You say there will be very few of them. And the fiscal note now is zero, basically. So we have fewer, the way I understand this, we're going to have fewer cigar bars. Let's say though, I want to give you a little example, if you have \$100,000 gross revenue in a cigar bar, we'll just keep it at \$100,000, how are they going to go and...where would the cigarettes or the tobacco be lined up? So on the revenue from cigars is whatever it would...let's say that's \$10,000. How do they go figure this out? Who goes in, actually looks at the books and can you explain that process. [LB355]

SENATOR LAUTENBAUGH: Yes, I can. Thank you for the question. Once again, we've left a lot of this up to the rule-making authority for the Liquor Control Commission as they generally investigate this kind of thing. While this is...I wouldn't even call this an innovation in the law, this is just another thing for the Liquor Control Commission to do. There would be, in discussions with them, it's my understanding there would be a form that is filled out and proof that would be required of the revenue amounts. Already there is, you know, proof in the form of the taxation receipts for the sale of cigars, and proof in the form of tax receipts and tax payments for the sale of alcohol. So that would be the kind of backing documentation that the Liquor Control Commission would look to in any kind of an audit setting. [LB355]

SENATOR GAY: Okay. And it's gross revenue, not... [LB355]

SENATOR LAUTENBAUGH: Yes. [LB355]

SENATOR GAY: ...an at profit, but gross revenue of how much cigarettes and...so in the scenario if I'm going down, I know in my district I have a tobacco shop and they sell off-sale liquor, okay? So they're selling, I assume, cigarettes, cigars, other things. I haven't been in it but drove by it a lot. They have...what I do see they have...here's signs you can buy beer, whatever. So what would prevent them from putting in walk-in humidors and all of a sudden we got more bars popping up. Your 10 now is 100. I mean, I don't know, it's a big state. There's...what's to prevent someone from doing that? [LB355]

SENATOR LAUTENBAUGH: Well, honestly, the short answer is there's nothing that's an absolute prevention, that's the point. This is not supposed to be a closed class because then you get into constitutionality issues. The problem with it is though is that you would...there's a market for cigars and that is the size of the market for cigars. And

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just because additional places are desirous of getting 10 percent of their revenue from cigars doesn't mean the demand is going to change for cigars. Before there was a ban, there were a half dozen places like this I can think of in the entire state. And I don't know how you manufacture demand just because there's been a ban on indoor smoking. If anything, that might be going the other way. So a place could open certainly and try to get approved as a cigar bar. But the requirement of the walk-in humidor is key. And we had some discussion yesterday about, well, what is that? Is that something that could be the size of the suitcase? The phrase that you have to keep in mind is walk-in. And depending on who you are, a suitcase is almost never the size of a walk-in anything. So yeah, we're talking about a room. And the testimony to the committee was for a place like Jake's that to get a comparable revenue level bumping up against this 10 percent they have a walk-in humidor with tens of thousands of dollars of inventory in it. [LB355]

SENATOR ROBERT: One minute. [LB355]

SENATOR LAUTENBAUGH: And, I'm sorry, I'm going on too long taking your time. But it isn't correct to say just any place could do this. It would be any place that would be willing to invest tens of thousands of dollars to become a cigar bar could apply to become a cigar bar, certainly. But they would still have to meet the ongoing revenue requirements. [LB355]

SENATOR GAY: And I appreciate the answers. That's all right on the time. I hit my light again. But I still get to the point, I think a lot of us are saying we understand cigar bar as a cigar bar, not cigars and cigarettes and other things. And I know we're trying to find some kind of agreement here and we will, I assume. I don't know on that. But I just...the cigarette portion of it, to me, is I think we're opening up something down the road, unforeseen that we're going to...it's going to trip us up down the road. [LB355]

SENATOR ROBERT: Time. [LB355]

SENATOR GAY: Thank you, Mr. President. [LB355]

SENATOR ROBERT: Thank you, Senator Gay and Senator Lautenbaugh. Senator Howard, you are next and recognized. [LB355]

SENATOR HOWARD: Thank you, Mr. President, members of the body. If Senator Lautenbaugh would yield to some questions. [LB355]

SENATOR ROBERT: Senator Lautenbaugh, will you yield to a question? [LB355]

SENATOR LAUTENBAUGH: Yes, I will. [LB355]

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SENATOR HOWARD: Thank you, Senator Lautenbaugh. I'm getting numerous e-mails from District 9 with questions. And I thought the best thing to do would be to just ask you these questions on the floor and get answers to their concerns. So I will, if that's all right with you, I'll just run down this list and we'll talk as long as we have time. [LB355]

SENATOR LAUTENBAUGH: Sure. [LB355]

SENATOR HOWARD: The first thing is, how is the Liquor Control Commission going to enforce whether a business is abiding by the law, if this bill passes? One of the follow-ups is, will they be doing unannounced inspections? [LB355]

SENATOR LAUTENBAUGH: Well, to the latter I don't know because we've left the discretion to the Liquor Control Commission for enforcement. So they will enforce it as they see fit. I know they've talked about on the front end they have looked at quarterly checks and verifications of the revenue, just to make sure that in the first year of operation the place meets the threshold. Then I'm assuming they would go to...I suppose they could still do quarterly. They might do semiannual or annually, at a minimum annually, keeping in mind that this would be readily traceable through the tax receipts. And any attempt at falsification would imperil the liquor license outright. [LB355]

SENATOR HOWARD: Okay. Well, then as possibly a follow-up to that question, is the Liquor Control Commission is already stretched too thin, not through any fault of their own. But they have a lot of responsibility covering the issues across the state. And when it comes to enforcing the liquor laws, it's been considered lucky if we had a single compliance check done per year on a liquor license. Isn't this going to just be adding additional burden to the already limited resources of the Liquor Control Commission? [LB355]

SENATOR LAUTENBAUGH: Well, in a relative way I suppose anything that you ask them to do would be an additional burden if it's more than what they're doing now. And certainly they are busy. But they have looked at this as I have and they looked at the experience in states like New Mexico, where we had a similar...they had a similar exception and had four or five applicants, one of which qualified. And they know realistically, as we've tightened this down, that...especially with an amendment that's coming to take the place of a placeholder one here, there will probably be a \$1,000 nonrefundable application fee just to get the Liquor Control Commission to come look at you. That would be a revenue source for them. And they've looked at this and said realistically this just isn't going to be very many places, this is not a burden to us. That's why the fiscal note goes to basically zero, and with the application fee probably a positive. [LB355]

SENATOR HOWARD: Now it's as if you're anticipating my next question here. How

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much is the Liquor...how much is a cigar bar license going to cost the applicant and do we know how much it will cost the Liquor Control Commission to process this license? [LB355]

SENATOR LAUTENBAUGH: Well, again, I don't know what the license fee specifically will be. I guess it would be on par with the Class C license otherwise. The application fee is something that I thought was an extra thing we could do to keep anyone from trying to game the system by applying for this and then not making the threshold and then reapplying a year later or something like that. And I'm sorry, what was the other question? [LB355]

SENATOR HOWARD: Well, I would put this another way. Shouldn't you...wouldn't you agree with me that the cost of the liquor license should cover the cost that it is to process that license? Shouldn't the applicant be required to pay the cost to issue the license rather than have the taxpayers subsidize the cost here? [LB355]

SENATOR LAUTENBAUGH: Actually, I don't believe any of the licenses cover the cost of having the license. And I wouldn't be willing to entertain such a broad-based, sweeping increase in license fees throughout the state on just this minor bill. [LB355]

SENATOR HOWARD: Well, you don't feel that we should be subsidizing the... [LB355]

SENATOR ROBERT: One minute. [LB355]

SENATOR HOWARD: Thank you...that we should be subsidizing the cost of the license to the holder, do you? [LB355]

SENATOR LAUTENBAUGH: I don't believe we do subsidize it. I think that liquor taxes and whatnot pay for that. But you asked me the cost of the license should reflect...the actual license fee is how I interpreted it. And it doesn't currently on any liquor license is my understanding, it's the taxes on liquor that make that up would be my belief. [LB355]

SENATOR HOWARD: To my knowledge we don't cover the subsidy of any other license that we issue. We don't cover the cost of a license to the beauticians. They have to pay the full cost to have that license processed and to receive that license or, for example, social workers. I mean, the cost of the license covers the cost of the processing and what's involved in the manpower, if you will, to get that license produced. I would feel that that is really only fair to the person applying for the license. Thank you, Senator Lautenbaugh. [LB355]

SENATOR ROBERT: Thank you, Senator Howard. Senator Stuthman, you are next and recognized. [LB355]

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SENATOR STUTHMAN: Thank you, Mr. President, members of the body. I would like to engage in a little conversation. I have a couple of questions for Senator Lautenbaugh. [LB355]

SENATOR ROBERT: Senator Lautenbaugh, will you yield to a question from Senator Stuthman? [LB355]

SENATOR LAUTENBAUGH: Yes, I will. [LB355]

SENATOR STUTHMAN: Senator Lautenbaugh, you had stated that there's a good possibility that a person could prove the amount of revenue that he has generated from tobacco-related products or cigars by the amount of tax receipts that he has paid on the amount of cigars that he has done. Does...is this a direct correlation to revenue generated do you feel? [LB355]

SENATOR LAUTENBAUGH: A direct correlation, if you get down to sales tax and/or tobacco tax, yes, it would have to be. [LB355]

SENATOR STUTHMAN: Could an individual that owns one of these establishments purchase a large amount of tobacco-related products just to meet that level, immaterial of what he's going to sell those products for or if he's going to consume a lot of them himself or give them away to his friends, which will not generate any revenue as far as the revenue is concerned. I have a real concern with the fact that, you know, the amount of tax that is paid and the individual bar owner and, you know, I'm not sure of this but I'm almost positive that when he purchases the tobacco products he has to pay the tax. Would that be correct, Senator Lautenbaugh? [LB355]

SENATOR LAUTENBAUGH: Yes, but that's not revenue, that's buying. The revenue would be the sales tax also which, of course, is the tax that's paid when you sell something, generating revenue. And that...reports for that exist just as much as reports for anything else. [LB355]

SENATOR STUTHMAN: Thank you, Senator Lautenbaugh. The concern that I also have is the fact that this bill, in my opinion, is very, very loosely drafted yet because of the fact that, you know, the annual receipts has got to meet that 10, or 15, or 50 percent, or whatever is decided upon if this bill would be successful to pass. But at what time, you know, are they going to go back a year and take those annual receipts of revenue, proof of revenue? I don't know. Could I, Mr. President, could I ask Senator Lautenbaugh another question? [LB355]

SENATOR ROBERT: Senator Lautenbaugh, will you yield to a question? [LB355]

SENATOR LAUTENBAUGH: Yes. [LB355]

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SENATOR STUTHMAN: Senator Lautenbaugh, how do you feel that you have this bill drafted as to when those...the annual report is due. Which annual report are you going to utilize? And is there with the Liquor Commission at the present time a line-item amount of revenue generated from tobacco products and alcohol products? Are there two lines already? [LB355]

SENATOR LAUTENBAUGH: Are there two lines on what, Senator? [LB355]

SENATOR STUTHMAN: On the fact that defines tobacco products in total revenue of the bar and defines alcohol products in the Liquor Control Commission? [LB355]

SENATOR LAUTENBAUGH: Senator, I continue to be happy to yield to your questions up to a point, but I believe we discussed this yesterday. If you're seeking information, I'll provide it. If this is part of a filibuster, my answers are going to become one word or nonexistent. I answered that question yesterday. I don't know if you were paying attention to the answer, but I'm not going to restate it today. [LB355]

SENATOR STUTHMAN: Thank you, Senator Lautenbaugh. That is my concern as I have stated before. And I may have to go to the Liquor Commission to find out some of the answers on that. But I am also concerned with the fact, you know, that, you know, when are we going to have in this bill... [LB355]

SENATOR ROBERT: One minute. [LB355]

SENATOR STUTHMAN: ...the fact that, you know, it's going to be defined as to which annual report are we going to utilize. Which annual report is the Liquor Commission going to utilize? That is my concern. I think we have to adjust or work to get the answers that we want to have now when we pass this bill, if this bill passes. But we have to get these answers, you know, not in a year afterwards. Another thing that I have a concern with also is the fact that, you know, are we drafting this bill for one, two, or five businesses to keep them open? Are we trying to legislate something that allows that business to stay open and not allow any other business to, you know, to attain that category? [LB355]

SENATOR ROBERT: Time. [LB355]

SENATOR STUTHMAN: Thank you, Mr. President. [LB355]

SENATOR ROBERT: Thank you, Senator Stuthman. Those wishing to speak, Senators Carlson, Wightman, Gay, Lautenbaugh, and Avery. Senator Carlson, you're recognized. [LB355]

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SENATOR CARLSON: Mr. President and members of the Legislature, I'm going to address...I'm looking at Senator Wightman. And I'm not going to ask you a question right now. But I'd ask you to listen here. And I would like to address Senator Lautenbaugh. [LB355]

SENATOR ROBERT: Senator Lautenbaugh, will you yield to a question? [LB355]

SENATOR LAUTENBAUGH: Yes, I will. [LB355]

SENATOR CARLSON: Senator Lautenbaugh, this is in regard to Senator Wightman's amendment. And what I'm getting at is the possibility of an unintended consequence here that in a sense might lead towards disqualifying a cigar bar. But I don't know currently what goes on. Because in his amendment here it's got the words "which does not sell food." What is food and do cigar bars right now sell gum? Do they sell Breathsavers? What is food? And if that's not fairly tight, that becomes an out for somebody to pursue and then we've got an unintended consequence. [LB355]

SENATOR LAUTENBAUGH: I would agree. I'm thinking out loud here, which is always dangerous. I don't...I can't recall any places that would currently qualify as a cigar bar selling food of any kind. I don't know if breath mints and the like would qualify? I can't recall them selling those either, honestly. But if we need to define food more clearly, what this amendment was designed to do, I don't want to speak for Senator Wightman, but we did discuss it. And I think I was the one who pointed out the food concerns, that some had concerns that this would bring smoking back to places where people are eating, that's not the intent, so we were trying to take that out utterly. If the word "food" needs to be more clearly defined, we can surely do that. Once again, I don't know if breath mints would come in with that or not or if any place is currently selling them. I can guarantee you if the choice were put to these businesses of being forced out of business or continuing to sell breath mints, I know what their choice would be. But I can't answer the question better than that. [LB355]

SENATOR CARLSON: Okay, thank you, Senator Lautenbaugh. Senator Wightman, would you yield? [LB355]

SENATOR ROBERT: Senator Wightman, will you yield to a question? [LB355]

SENATOR WIGHTMAN: Yes. [LB355]

SENATOR CARLSON: And maybe this is a concern that if the bill goes to Select File it might a consideration. But you're wording in here "which does not sell food," and I've not been in a cigar bar so I don't know, do they sell candy bars? Do they sell...and the reason I ask this is because in my campaign to be elected to the Legislature junk food and snack food and what was food became an issue between me and my opponent.

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And I say food is food. So I'd hate to see somebody restricted from selling anything that could be eaten. But I understand the intent. It's not to allow a cigar bar to prepare food and sell it. I think that maybe needs some clarification. [LB355]

SENATOR WIGHTMAN: Well, food is kind of like a lot of things, you know it when you see it or when you eat it, (laugh) Senator Carlson. But... [LB355]

SENATOR CARLSON: You and I both like food. [LB355]

SENATOR WIGHTMAN: But it seems to me that anything you ingest probably, other than drink, is probably food. Senator Janssen here knows what food is all about. (Laugh) [LB355]

SENATOR CARLSON: Okay. Well, I'm not again trying to throw a roadblock here, but I would not want that to become an unintended consequence that creates trouble if this law passes and LB355 becomes law. Thank you, Mr. President. [LB355]

SENATOR ROBERT: Thank you, Senator Carlson. Senator Wightman, you are recognized. [LB355]

SENATOR WIGHTMAN: Thank you, Mr. President, members of the body again. You know there's been some discussion I know with regard to the fact that you could sell cigarettes and whether that's a plus or a minus with regard to the bill I don't know. But it does two things. Number one, it does not count toward the 10 percent. So just as an example, and I don't know what one of these establishments might generate in the way of revenue. But just say that one had I'm going to use \$501,000 because it fits the other figures I have, and they sold \$400,000 worth of drinks of one kind or another, they sold \$60,000 worth of cigarettes, and they sold \$51,000 worth of cigars and cigar-related activities. Well, the \$60,000 gets counted in. They have \$511,000 of revenue, and their \$51,000 doesn't qualify because it's just a few dollars short. So in effect, it seems to me, that you're increasing the threshold that would be required to meet the 10 percent. So I'm not in favor of restricting them only to cigars. I think that if they sell cigarettes that really does not hurt the legislation at all and it creates a higher threshold. They still have to meet the 10 percent. So I'll continue to listen to the debate, but I do think AM827 is a very limiting type of amendment that will require them to sell cigars as opposed to the original bill which, really, even though they called them cigar bars, wouldn't have required a cigar to ever be sold, and they still could have met the test only by the sale of cigarettes. So I'll listen to the rest of the debate. Certainly will support the amendment and as of right now, if the amendment is passed, will support the underlying bill. Thank you, Mr. President. [LB355]

SENATOR ROBERT: Thank you, Senator Wightman. Senator Lautenbaugh, you are next and recognized. [LB355]

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SENATOR LAUTENBAUGH: Thank you, Mr. President, members of the body. And I'm going to lay out my plan today up front here. It is not my intention to speak more than I need to on this bill. We've given it a lot of discussion, some of it has been good, but we are venturing into the realm of repetition and I don't think it's to bring more knowledge to the body, that much is certain. We just heard a comment that apparently we'll have to work to get the answers to these questions. There are other ways to get answers to questions, actually listen after you've asked the question, a lot of times leads you to the information that you sought if seeking information was your goal. I've answered a lot of questions on this bill, and I'll answer questions that continue to be asked in good faith, seeking actual information as to how this bill would work. But I'm not going to become a willing joyful participant in an attempt to talk this longer than it needs to. And my answers are going to become brief or nonexistent if you're trying to make me help you with a filibuster. We just heard another comment that the concern today was that this bill might be just legislation for a few places and that we're not going to allow others to enter. That same Senator yesterday had the horrifying thought that under this other places could enter the market. Now which is it? What is the concern here? This is not drafted to be a closed class because I don't think that's a constitutional thing to do. And at a very basic level I don't think it's the right thing to do. If you meet these revenue thresholds you would qualify as a cigar bar, it's that simple. The amendment improves the bill and tightens it down. We're getting ever closer to the point where people objecting to this, I would hope, would start to ask themselves, what are we really objecting to here. If Senator Stuthman is correct and this really only allows for four or five places, ask yourself again, what are you objecting to? Yesterday we heard a very professorial and informative statement of why people should be so willing to give away their rights, and that same Senator was not aware that there were two cigar bars in Lincoln, there were. And if that Senator read the same online comments that I did after the Journal Star article, there was a nice comment in there about how one of them had been utterly destroyed by Lincoln's smoking ban. I never stood before you and said restaurants had been destroyed. I never stood before you and said bars had been destroyed. But I don't think it takes a great leap to see how cigar bars might be negatively impacted by a smoking ban. The committee testimony was very clear. The one in Omaha that testified the most, they went from 13 employees to 3. But there's a question, well, nobody's lost jobs in this, nobody's lost business. They're down about 50 to 70 percent on their revenue overall. But nobody has lost jobs, nobody has lost business. We need to focus on what this bill actually does, which creates a very narrow exception. There was a market for about a half dozen of these before, there's going to be a market for about a half dozen of these if this passes. We can't create demand for cigars here, that's not our job and that's not our ability. What we are allowing is adults to have someplace to go and enjoy a cigar, which they used to be able to do and hopefully will again. And we've heard all these horror stories about on the one hand this will restrict people from entering the market, on the other hand it's going to somehow allow everyone to enter the market. We've heard how a walk-in humididor could conceivably be

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the size of a suitcase. That's not the case, I can promise you that, especially in my case. A walk-in humidor is a pretty big thing. You walk into it, it's not a clever name. And it's full of \$10,000, \$20,000, \$30,000, \$50,000, \$80,000 in revenue or in cigars to meet these percentages. This is not something that anyone can lightly enter into. And we can sit here and manufacture concerns, and talk about how we're opening the door... [LB355]

SENATOR ROBERT: One minute. [LB355]

SENATOR LAUTENBAUGH: Thank you, Mr. President. That ignores the market, that ignores logic, that ignores the facts, that ignores Senator Wightman's amendment. Senator Wightman just ably pointed out that we're not doing anyone a favor by taking cigarettes out of the mix here as far as the cigar bar owners go, because if they continue to sell cigarettes, it counts against their revenue percentage from cigars. That's not an innovation in this bill, that's math. The more things you sell that aren't cigars and related products, the more it hurts your ability to get to that revenue threshold. Again, that's not something I invented, that's math. We lowered it to 10 percent to take care of one of the little guys in Benson that testified this is what the threshold would mean just based upon cigar sales. That guy has \$30,000 in inventory in a walk-in humidor just to get to hopefully 10 percent. [LB355]

SENATOR ROBERT: Time. Thank you, Senator Lautenbaugh. Those wishing to speak, Senators Avery, Stuthman, and Wallman. Senator Avery, you're next and recognized. [LB355]

SENATOR AVERY: Thank you, Mr. President. I know that Senator Lautenbaugh does not want to answer questions but I would like to ask him one. [LB355]

SENATOR ROBERT: Senator Lautenbaugh, will you yield to a questions? [LB355]

SENATOR LAUTENBAUGH: Absolutely. [LB355]

SENATOR AVERY: Thank you, Senator Lautenbaugh. Do you think that it is possible under this bill, I didn't see any language restricting this, for a cigar bar to offer, say, a \$15 cigar and a free pitcher of beer and in the process jack up the revenue from the sale of the cigars and suppress the revenue from alcohol? Is that possible in this bill? [LB355]

SENATOR LAUTENBAUGH: I don't know that it's possible in the marketplace and in reality, Senator. The bill doesn't specifically either repeal the market for us or underline that market forces still continue to apply, but they do. So, no, you could not just continue to give things away at a discounted amount. [LB355]

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SENATOR AVERY: But you would admit that it is possible that someone trying to gain the system could in fact manipulate the sales in this manner and it would not be restricted by this bill. [LB355]

SENATOR LAUTENBAUGH: I would point out to you, Senator, just for clarification sake I didn't say I wouldn't take questions. I said I would answer all questions seeking information. And I do believe we've discussed this, but I'll do it again. Yes, if you ignore all other provisions of the bill regarding the walk-in humidor, regarding the application fee that's coming, regarding all the other strictures, regarding the marketplace, regarding the reality, regarding what it takes to function as a bar, regarding how you would possibly turn a profit giving things away, if you regard...disregarded everything else and all other aspects of reality, yes, someone could do what you're suggesting for a very brief time. [LB355]

SENATOR AVERY: Thank you, Senator Lautenbaugh. Since you are a lawyer, I'd like to just review some of the court cases, I'm not going to ask you more questions, some of the court cases that exist that are relevant to this issue. Roberts v. the U.S. Jaycees, this was in 1984. The U.S. Supreme Court specifically ruled against the argument that smoking bans in public places are unconstitutional since they interfere with the smokers' ability to assemble and associate with others while exercising their First Amendment rights. We've heard arguments in here all of yesterday and previously that this isn't an unreasonable intrusion into business. The Supreme Court has upheld these bans in the past. Going back as early as October 1884, the Supreme Court took up the issue of the states infringing on the individual right to perform an otherwise legal act, we've heard that argument too. This is a legal product. Senator Karpisek's made that case twice, it's a legal product, so you're going to restrict me from smoking or using a legal product in my business. The Supreme Court took up that issue of the states infringing on an individual's right to perform an otherwise legal act as protected by the 14th Amendment. The court supported the power of the state to prescribe regulations to promote the health, let me repeat that, to promote health, peace, morals, education, and good order of the people. The Supreme Court, in Mugler v. Kansas,... [LB355]

SENATOR ROBERT: One minute. [LB355]

SENATOR AVERY: ...again the Supreme Court ruled that the state has the right to protect the community and protect the general well-being of the community. That is relevant to this issue as well. And another case in 1976, New Jersey Supreme Court had the first case where a nonsmoker gained protection from a harmful workplace secondhand smoke. The court ruled that there shall not be the use of any type of cigarette or other tobacco which has been determined to be by the Surgeon General deleterious to a person's health. That is also a court case. So those who are making these arguments, I would suggest they are not valid arguments. The courts have ruled and the Attorney (sic) General has made it very clear that secondhand smoke is

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detrimental to public health. We have an obligation in this body, not to... [LB355]

SENATOR ROBERT: Time. [LB355]

SENATOR AVERY: ...elevate individual...is that time, sir? [LB355]

SENATOR ROBERT: Yes, sir. [LB355]

SENATOR AVERY: Thank you. [LB355]

SENATOR ROBERT: Thank you, Senator Avery. Senator Stuthman, you are next and recognized. [LB355]

SENATOR STUTHMAN: Thank you, Mr. President, members of the body. I would like to engage in a little conversation and ask a couple of questions of Senator Wightman. [LB355]

SENATOR ROBERT: Senator Wightman, will you yield to a question? [LB355]

SENATOR WIGHTMAN: Yes. [LB355]

SENATOR STUTHMAN: Senator Wightman, in your amendment it strikes "cigarettes." So in other words, anything other than that, cigarillos, Swisher Sweets, or anything like that, is that included in the cigar part of it? [LB355]

SENATOR WIGHTMAN: Well, I think it's defined in the term "cigarettes and cigars." Cigarettes are a paper wrapped product. Cigars are a tobacco wrapped product and I think that's the difference. So I think whichever it is, how the packaging or the wrapping is, in my understanding of what defines what's a cigarette and what's a cigar. [LB355]

SENATOR STUTHMAN: So in other words it's defined as the fact of how the product is wrapped, either with a paper or with a tobacco leaf? [LB355]

SENATOR WIGHTMAN: That's my understanding. I don't think I had it with me yesterday. I had with me a definition. It is defined and we specifically refer to that in...it's a cigarette as defined in Section 69-2702, and that basically is determined by the outer wrapping of the particular cigarette. [LB355]

SENATOR STUTHMAN: So cigarillos or Swisher Sweets they're not wrapped with a paper, they're wrapped with a tobacco leaf? [LB355]

SENATOR WIGHTMAN: Since I don't smoke either one of them, Senator Stuthman, I'm not absolutely sure, but I think they are a cigar. [LB355]

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SENATOR STUTHMAN: Yeah, but you know, and I'm not aware of it either because I have never smoked those products. That is an issue that is a concern of mine. One other question, Senator Wightman, is the fact that your amendment has to do with if that establishment has a walk-in humidor then they are, you know, can be qualified for one of these cigar bars. Is that correct? [LB355]

SENATOR WIGHTMAN: Well, that's only one of the requirements, they have to have a walk-in humidor. Obviously, they have to sell 10 percent from cigars and cigar-related products as well. [LB355]

SENATOR STUTHMAN: Would you...could you imagine that some of these establishments may purchase a walk-in humidor, you know, within the next month or so as one of the stipulations that requires...as a requirement for the fact that, you know, that is a requirement and they need to have that walk-in humidor. [LB355]

SENATOR WIGHTMAN: Well, I think it's like Senator Lautenbaugh suggested. You know, these are going to be business decisions. And I think you would have to know that you had a pretty good market to even consider buying the humidor and attempting to get a license because 10 percent from cigar and cigar products, in my opinion, is a pretty high threshold. That bar is not going to be very profitable if all you do is sell cigars and cigar products. I don't think probably anybody will be able to maintain a business if that's all they're going to sell. [LB355]

SENATOR STUTHMAN: Thank you, Senator Wightman. In one of the letters of testimony, you know, that I went over in the last evening was the fact that a cigar bar, you know, received their...that was...the cigar tobacco was the primary source of their income. In my opinion, a primary source of income is 51 percent or more and that is what I consider. And if that is what it is, you know, I think, you know, if we're going to allow something like that and it's their primary source of income... [LB355]

SENATOR ROBERT: One minute. [LB355]

SENATOR STUTHMAN: ...the issue of a tobacco bar I think that's where we should be. I think that's a goal and maybe we should try to attain that. You know, the majority of their income, their primary source of income is from tobacco products, cigars as designated. And they're going to take, you know, there's a possibility that we will eliminate the cigarettes out of that portion. But I think we got to be very careful as to what we take out and what we put in. I think it could be manipulated as to, you know, how you're going to attain that sales revenue portion when you get your...when you apply for the license. I think there's a lot of questions that need to be answered yet. And I'm not going to repeat these questions all the time. But I will say, you know, that we as legislators... [LB355]

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SENATOR ROBERT: Time. [LB355]

SENATOR STUTHMAN: Thank you, Mr. President. [LB355]

SENATOR ROBERT: Thank you, Senator Stuthman. Senator Wallman, you're next and recognized. [LB355]

SENATOR WALLMAN: Thank you, Mr. President, members of the body. Manipulation, I heard this term manipulation. Are we manipulating businesses putting them out of business? We don't encourage new businesses, so I'd turn the rest of my time over to Senator Lautenbaugh. [LB355]

SENATOR ROBERT: Senator Lautenbaugh, 4 minutes, 40 seconds. [LB355]

SENATOR LAUTENBAUGH: Thank you, Mr. President. Thank you, Senator Wallman. Briefly a few points. I appreciated Senator Carlson's concern, but I would note, and I did...I'm noting, I've been advised that food is defined in the Liquor Control Act anyway. So the definition is there. I don't think it would include breath mints in response to a specific scenario. But there is a definition for food that would be reference in the act otherwise. In response to Senator Howard's concerns, there was an allegation or a suggestion that the people who would be doing spot checks might be stretched a little thin. That's surely true in the case of the State Patrol which would be doing one kind of spot check. But the State Patrol doesn't do audits. So in the case of an auditor, that would be the person doing the spot check. They would be available to go look at the books anytime they wanted to. But again, we'd be talking about an auditor verifying the operative parts of this act, not the State Patrol. And this would not add to the State Patrol's burden for enforcement in anyway because, once again, that's not what they do. They don't do audits. Thank you, Mr. President. [LB355]

SENATOR ROBERT: Thank you, Senator Lautenbaugh and Senator Wallman. Senator Utter, you are next and recognized. [LB355]

SENATOR UTTER: Thank you, Mr. President. And good morning, colleagues. I'm not going to take a lot of time here. I must admit to Senator Lautenbaugh that I spent some time in the middle of the night last night conjuring up my idea of what a cigar bar was. I've never been in one. And in my wild and reckless days as a smoker, why, I bought my cigars, which I also tried among other legal things, I bought my cigars at something other than a cigar bar, I think, because I've never seen a walk-in humidor. But in my mind's eye I conjured up this nice place where people go and walk into this humidity-controlled room and purchase a fine cigar and walk out and sit down in an overstuffed leather chair along with some of their friends and light up and savor the smell and taste of a fine cigar. And these have to be people of purpose, people of

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persuasion, people of privilege that meet and greet and solve the world's problems. And I'm impressed with that part of it. I think the point that we're missing, honestly, is the health part of it. And I've listened for two days now about the personal liberty, the personal freedoms, that if we don't grant this intrusion into the antismoking bill we're going to be denying. And that's the part I'm having a hard time with. And I...so I come to you this morning and reaffirm my position that this is truly a health issue. And if you don't believe it's a health issue, you should visit a cancer hospital some day and just see some of the patients that have suffered the consequences of not only their own smoke but maybe of secondhand smoke. And I am concerned that this bill is just the beginning of many intrusions that will follow, not this year but in future Legislatures of granting exceptions to the state's antismoking bill. So I rise this morning in...again to tell you that I am opposed to granting this exception, and I'm opposed to it based on health reasons, and I am also opposed to it, partially Senator Lautenbaugh, because it cost me some sleep last night. And I assume that my mind's eye view of a cigar bar must be entirely wrong, but that's what came up. Thank you, Mr. Chairman. [LB355]

SENATOR CARLSON PRESIDING []

SENATOR CARLSON: Thank you, Senator Utter. Mr. Clerk, for an announcement. [LB355]

CLERK: Mr. President, Judiciary Committee will hold an Executive Session now under the north balcony; Judiciary, north balcony immediately. And two reports, Mr. President. Health Committee reports LB679 to General File; and LB342 to General File with amendments, those signed by Senator Gay. Thank you. (Legislative Journal pages 818-819.) [LB355 LB679 LB342]

SENATOR CARLSON: Thank you, Mr. Clerk. We return to our discussion of AM827. Those wishing to speak are Senators Avery, Lautenbaugh, Wallman, and Stuthman. Senator Avery, you are recognized. [LB355]

SENATOR AVERY: Thank you, Mr. President. I want to address the economic issue. And it's too bad Senator Karpisek is not here because he made a big issue of that yesterday and suggested that since I had never owned a small business and spent my career at the university I couldn't understand this issue. So I spent a little time working on it. And actually, there is quite a bit of empirical evidence, that is factual evidence that has tried to measure the economic effects of smoking bans. And these studies, I think factual evidence is important, in any debate we have here we ought not ignore it, these studies have shown either no effect, no effect or slight improvements in restaurant business and bar business with smoking bans. I would take you back to 2008, when we were debating LB395. We had some key support from the Nebraska Restaurant Association, the Nebraska Retail Federation, Big Red Keno, the Nebraska Hispanic Chamber of Commerce, Don Arena who owns the Red Fox on West O Street was

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quoted in the Lincoln Journal Star on the Lincoln smoking ordinance. And he said, I was so scared that my business was going to be hurt. He has since changed his mind, quoting him now, it's done wonders for my business, Arena said. Adding a personal note, I can now come to work and breath normally and so can my workers. In Delaware businesses remain steady one year after the state passed a Clean Indoor Air Act. Also data from the Delaware Alcohol Beverage Control Commission show that the number of restaurant, tavern and tap room licenses increased in the year since the law took effect. Data also from the Delaware Department of Labor shows that employment in the state's food service and drinking establishments increased in the year since the smoke-free law went into effect. And there are other studies. New York passed a Clean Air Act in 2006, and the...a study showed that, and I'm quoting, the law has not had an adverse financial impact on bars and restaurants. California also found that taxable sales receipts for bars and restaurants increased since the 1997 smoking ban went into effect. Studies of sales tax data from 81 localities in six states have consistently demonstrated that ordinances restricting smoking in restaurants and bars have no effect on revenues. So I don't understand the argument that's been made here. It certainly is not based on any factual information, it's based upon emotion maybe or personal preferences but that's not how we should make law in this state. We ought to look at what is factual and base our decisions on what is in the public interest, not as what's in my private interest as a smoker or someone who likes to go and smoke in bars, it should be the public interest. And it's very clear that the harmful effects of smoking are indisputable. Passive smoking by nonsmokers... [LB355]

SENATOR CARLSON: One minute. [LB355]

SENATOR AVERY: ...is a serious health issue. Did you say one minute, Mr. President? [LB355]

SENATOR CARLSON: One minute, yes. [LB355]

SENATOR AVERY: Thank you. Smoking in public places, quite simply, creates an environment in which nonsmokers become unwilling smokers. My rights matter too. My right as a nonsmoker means that I should not be placed in the situation of being an unwilling smoker by those who are insisting that they have to have that right. So what I am trying to do here is to frame this issue in reasonable, rational, logical, factual information and I hope that you would agree to that. I'm going to speak later about the public support for this. We have some pretty good data on that. Thank you, Mr. President. [LB355]

SENATOR CARLSON: Thank you, Senator Avery. Senator Lautenbaugh, you are recognized. [LB355]

SENATOR LAUTENBAUGH: Thank you, Mr. President, members of the body. We just

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covered a lot of ground there. I respect my colleague, Senator Avery. But once again a laundry list of what the Supreme Court says is permissible is not how we make policy here, or otherwise we wouldn't need us because we have a Supreme Court. If they say we should do it, well by gosh, we should do it, so we become sort of a superfluous rubber stamp at that point. Let me read something from the Journal Star here, someone who wrote in. It works in perfectly into this debate about whether or not businesses have been hurt. Quote, you're wrong, a very elegant downtown Lincoln cigar bar with no real estate to open an outdoor smoking room died a slow and painful death after, I'll delete the councilman's name, end around at the council enacting a smoking ban in Lincoln. The health of the employees was saved. He had to fire them because he couldn't pay them. And he had his bar on the market for a couple of years before someone would buy it. Local government killed his business and left an entrepreneur broke and broken. Again, I have not stood here before you and said this hurt restaurants. I've not stood here before you and said this hurt bars in general. But if you're going to represent that this doesn't hurt businesses, you're asking us to...you're kind of defying logic I would suggest, because there was an example of a business in Lincoln that doesn't even exist. And apparently it was so effectively wiped out that the Senator from Lincoln didn't even know it existed. But by gosh, he has a right to go in there. Well, yes, he does, he surely does. They may not roll out the red carpet when the place reopens but he surely has the right to go in there. But we're not talking about forcing people to be exposed to smoke because again we're talking about a half dozen places that existed before the ban took effect. We hear again this doesn't hurt business. Committee testimony said otherwise. Here are the numbers from a place called Cigarros in Omaha after the Omaha ban took effect, comparing revenues, 2008 and 2009, June off 34 percent, July off 40 percent, August off 23 percent, September off 41 percent, October off 47 percent, November off 66 percent, December off 70.2 percent. That's not tobacco revenue that they're off, that is total revenue that they've off, 70 percent December to December. The only thing that's changed is the smoking ban. So please don't stand up and tell me this didn't hurt business. It probably didn't hurt GM either. Guess what? GM doesn't operate a cigar bar. It probably didn't hurt McDonald's, same problem, McDonald's doesn't operate a cigar bar. But let's not stand here and fool ourselves. These are small businesses that we're forcing out of business otherwise. And so say, well, the Supreme Court says we can do it doesn't make it right. States all around us have exceptions for cigar bars. States throughout the nation have exceptions for cigar bars. Yet somehow we have to be different? I'd suggest not, obviously, or I wouldn't be standing here. We can make room for this. The argument of the slippery slope doesn't wash. The next thing comes along and you don't like it, say no to it. I'll say no to it in all likelihood because this is the best we can do and this is the only thing we can do in my mind in this environment. That doesn't make it right, that makes it reality. And I would ask you to continue to support this amendment. I would ask you to support this bill. And please don't be dissuaded by these arguments that an out-and-out ban is constitutional so we should do it and not allow any exceptions. We are here to be a little bit reasonable.

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SENATOR CARLSON: One minute. [LB355]

SENATOR LAUTENBAUGH: I thought we were here to actually focus on the facts. I spoke again to the Liquor Control Commission who said, no, you can't give away multiple drinks in exchange for a cigar, that violates a provision of giving away multiple drinks for a cigar or multiple drinks for anything for one price. So that would be illegal. So to answer those questioners who said, why don't you charge a huge premium for a cigar and give away free drinks? Well, you can give away one, but you can't give away more than that under the law. That's not going to get to where the people who are worried about this thought that would get them. Thank you, Mr. President. [LB355]

SENATOR CARLSON: Thank you, Senator Lautenbaugh. (Visitors introduced.) Senator Wallman, you're recognized to speak. [LB355]

SENATOR WALLMAN: Question. [LB355]

SENATOR CARLSON: Question has been called. Do I see five hands? I do. Question is, shall debate cease? All those in favor vote aye; all those opposed vote nay. There's been a request to place the house under...record, Mr. Clerk. [LB355]

CLERK: 27 ayes, 5 nays to cease debate, Mr. President. [LB355]

SENATOR CARLSON: Debate does cease. Senator Wightman, you are recognized to close. [LB355]

SENATOR WIGHTMAN: Thank you, Mr. President, members of the body. AM827 to the committee amendment, AM445, is a relatively simple amendment. But it does take care of a lot of the problems that I had or all of the problems, I guess, that I had with the original bill and the committee amendment. To refresh your memory, the committee amendment and the original bill taken together provided that they could meet, as I recall, a 15 percent threshold but they could use cigarette sales in establishing that threshold. As a matter of fact, if you read the bill in its entirety you would find that they didn't have to sell...the establishment would not have to sell a single cigar, there would not have to be a single cigar smoked in the establishment in order to qualify because they could use all cigarette sales in arriving at that threshold. My opinion was that if such a bill was to be passed, and I am supporting the underlying bill, that it should be limited to counting the cigar sales in meeting any threshold. I originally introduced I think it was AM805 that would have provided that 15 percent would have been the threshold. Since Senator Lautenbaugh agreed that we could take out an establishment that sold food within the establishment, I agreed that that could be limited to 10 percent. So what AM827 does is provide there can be no food sold in the establishment, that there's a 10 percent threshold and that can be met only by the sale of cigars and cigar-related

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products. You can sell cigarettes. Cigarettes can be smoked on the premises but they will only increase the revenue and make the 10 percent from cigar and cigar-related products more difficult to reach. With that, I do urge the...urge you to support AM827 to LB355 and the committee amendment. Thank you, Mr. President. [LB355]

SENATOR CARLSON: Thank you, Senator Wightman. You've heard the closing on the amendment. The question is, shall the amendment be adopted? All those in favor vote aye; all those opposed vote nay. Are there others wishing to vote? Senator Wightman? Record, Mr. Clerk. [LB355]

CLERK: 25 ayes, 9 nays, Mr. President, on adoption of the amendment. [LB355]

SENATOR CARLSON: The amendment is adopted. [LB355]

CLERK: Mr. President, the next amendment I have to the bill, Senator Lautenbaugh, AM816. [LB355]

SENATOR CARLSON: (Visitors introduced.) Senator Lautenbaugh, you're recognized to open on your amendment. [LB355]

SENATOR LAUTENBAUGH: Thank you, Mr. President. At this time I'd like to withdraw the amendment. [LB355]

SENATOR CARLSON: Amendment is withdrawn. [LB355]

CLERK: Mr. President, the next amendment I have to the committee amendment, Senator Avery, AM794. [LB355]

SENATOR CARLSON: Senator Avery, you are recognized to open on your amendment. [LB355]

SENATOR AVERY: Mr. President, I would request that this amendment be withdrawn and we move to the next one, which is mine, I believe. [LB355]

SENATOR CARLSON: The amendment is withdrawn. [LB355]

CLERK: Mr. President, the next amendment, Senator Avery, AM795. (Legislative Journal page 811.) [LB355]

SENATOR CARLSON: Senator Avery, you are recognized to open. [LB355]

SENATOR AVERY: Thank you, Mr. President. AM795, on page 1, lines 3 through 5, would strike the new matter and insert "Nothing in Sections 1 through 5 of this act shall

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be construed to permit smoking where it is prohibited or otherwise restricted by other applicable law, ordinance, or resolution." The reason for this is that there are several cities in the state that have already passed and enforce ordinances relating to this issue. Many of them are stronger and better than the state law that we passed last year. Lincoln, Omaha, Grand Island, Humboldt have such ordinances. If we pass this bill without this amendment then essentially what we are doing is making these ordinances null and void. And I hear a lot of talk in this body about local control. Well, if we really believe in local control, we ought to honor the actions of these entities. We ought to not take away the rights of these cities to protect the health of the people that reside in their city limits. I think this sets a bad precedent. I would also point out that at least in the case of Lincoln we had a referendum. I mentioned this the other day. And that referendum showed that there was overwhelming support by the people in this city for the smoking ban which is a strict smoking ban that does not allow cigar bars. And by the way, Senator Loudon mentioned, or excuse me, Senator Lautenbaugh mentioned a cigar bar that failed. I don't know about cigar bars in Lincoln. I did get an e-mail from a constituent that said that he had had a cigar bar that closed. And I know about that one, but I didn't know it was a cigar bar, it was never advertised as such. It was always known as a martini bar. The fact that he sold a few cigars doesn't make it a cigar bar in my mind. And he did go out of business, but he sold the business and it still is thriving as a successful martini bar and it is smoke-free. This is a democracy. We ought not to be overruling the vote of the people. In Lincoln we passed that referendum by 62 percent, that's a significant majority. And I will share with you later as this debate goes along that we have done statewide polling, or some people have done statewide polling, I have not, that showed that 69 percent of the people support a statewide smoking ban that applies to restaurants and bars. And I would submit to you that that includes cigar bars. We open the door to cigar bars and pretty soon we don't have a smoking ban. I believe that this sets a bad precedent. I would urge you to support this amendment. At least it does allow for localities and municipalities that already have in place and sometimes by popular referendum, already have in place smoking bans that do not allow cigar bars. And let them do that. If you believe in local control then let us support this amendment. Thank you, Mr. President. [LB355]

SENATOR CARLSON: Thank you, Senator Avery. You've heard the opening on AM795. Those wishing to speak are Senators Lautenbaugh, Fulton, Howard, and Stuthman. Senator Lautenbaugh, you are recognized. [LB355]

SENATOR LAUTENBAUGH: Thank you, Mr. President, members of the body. It would make our cigar ban null and void, that is false, that is a misrepresentation that was started by Mr. Welsch from GASP and so, not surprisingly, it is false. This is a narrow exception to Lincoln's ban. And when you hear people say, Lincoln got the chance to vote on this, as was pointed out in the local media, I believe, Lincoln never had the chance to vote straight up--should we allow smoking in a few cigar bars and nowhere else. And if you put that question to the citizens of Lincoln, judging from my mail, I think

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even in Lincoln they would say of course you should smoke in a cigar bar, why wouldn't you smoke in a cigar bar, what do you think it's for. Lincoln never got the chance to vote on this issue. And I would ask Senator Avery to yield to a question. [LB355]

SENATOR CARLSON: Senator Avery, would you yield? [LB355]

SENATOR AVERY: Yes, I will. [LB355]

SENATOR LAUTENBAUGH: Senator, if the citizens of Lincoln decided to vote tomorrow to allow cigar bars, would they be able to under our Clean Indoor Air Act? [LB355]

SENATOR AVERY: You mean the one we passed last year? [LB355]

SENATOR LAUTENBAUGH: Yes, sir. [LB355]

SENATOR AVERY: I don't think so. [LB355]

SENATOR LAUTENBAUGH: So in other words we seemed to have taken away local control, have we not? [LB355]

SENATOR AVERY: Well, you cannot have a referendum on an issue that overrules the state law, not a local referendum. [LB355]

SENATOR LAUTENBAUGH: So maybe you misunderstood my question. Since they cannot vote for that, they don't seem to have local control, do they? [LB355]

SENATOR AVERY: Well, not local control to the extent that you can overrule the state law. But what we're talking about here is state law overruling a local ordinance. [LB355]

SENATOR LAUTENBAUGH: Which would seem to be the same thing, wouldn't you agree? [LB355]

SENATOR AVERY: No, I don't. [LB355]

SENATOR LAUTENBAUGH: Didn't Omaha have a local ordinance that we overruled with state law? [LB355]

SENATOR AVERY: I'm not too familiar with the Omaha ordinance. I think they had some exemptions in there that Lincoln did not. They did not have a referendum, Lincoln did. [LB355]

SENATOR LAUTENBAUGH: But as I understand it you're fine with our state law we

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passed last year. [LB355]

SENATOR AVERY: Yes, I supported it strongly. [LB355]

SENATOR LAUTENBAUGH: So it's safe to say your passion for local control couldn't be described as limitless, could it. [LB355]

SENATOR AVERY: No, it is not. As I remember you opposed the bill last year. And you opposed it for the very same reasons that you're supporting this bill. [LB355]

SENATOR LAUTENBAUGH: I did. I opposed it because we were taking away local control. That ship has sailed, I would argue, my fellow senators. We took away local control when we passed this ban last year. And while my friend, Senator Avery, goes to gymnastics saying we did not take away local control because surely the people can't vote to override the Legislature in Lincoln, well, I would submit to you that's taking away local control, ladies and gentlemen. And we're giving back a small measure of freedom. And once again, I came back to this, I'll come back to it time and time again, this is part of my standard closing argument, which I wish I was giving, and that is you don't check your common sense at the door. We're not supposed to check our common sense at the door. Go out and ask 100 people in Lincoln if they really want no smoking in cigar bars. What do you think the answer will be even in Lincoln, just in cigar bars, if they understand how this is defined so narrowly to apply to so few places. People don't care. We've all seen the commercials with the people sitting there having dinner in a bar, luxuriating in the fact that they don't have to smell smoke, they can finally leave their houses and free to pursue a life of religious fulfillment. That's wonderful. That's not who we're talking about here. We're talking about people who want to go to one or two places and have a cigar. And I would submit to you that 90 percent of the people watching and 90 percent of the people out there on the street... [LB355]

SENATOR CARLSON: One minute. [LB355]

SENATOR LAUTENBAUGH: ...and, hopefully, 90 percent of the people here in this body don't care about that. There was an online poll done out in Washington, which has a very aggressive smoking ban, should we allow smoking in cigar bars only? Eighty percent in the state of Washington said yes. Again, we keep fogging the issue here. If you present it to people, do you want a ban in restaurants and bars? They say, yes. If you say, do you want it in cigar bars? I would submit to you they aren't going to care and my mail backs that up. If you discount the mail that we're getting that is generated by GASP in the form letter, I'm not hearing anything in opposition to this because it's modest, it's measured, it's reasonable, and it's warranted. And I would urge you to vote against this amendment because we've taken away local control already. This just gives back a little of freedom to the businessmen. [LB355]

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SENATOR CARLSON: Thank you, Senator Lautenbaugh. Senator Fulton, you are recognized. [LB355]

SENATOR FULTON: Thank you, Mr. President. I don't recall, I'm researching this actually right now, when the ban in Lincoln actually took place, when that vote took place. I have to take exception with Senator Avery's characterization, he's back there, I'm going to ask a question, his characterization that we the citizens of Lincoln have voted with specificity to cigar bars because, indeed, we have not. Would Senator Avery yield to a question? [LB355]

SENATOR CARLSON: Senator Avery, would you yield? [LB355]

SENATOR AVERY: You bet. [LB355]

SENATOR FULTON: Senator, as part of the ban that Lincoln enacted in, whenever it was, I think it was 2005,... [LB355]

SENATOR AVERY: It was four. [LB355]

SENATOR FULTON: ...2004, is that right? Okay. In that ban did we include tobacco retail outlets as part of the ban in Lincoln? [LB355]

SENATOR AVERY: We exempted smoking...I think we exempted tobacco outlets, retail outlets. [LB355]

SENATOR FULTON: Okay. [LB355]

SENATOR AVERY: If you have a business that sells cigarettes only and sells tobacco products only you can smoke in those. And we also exempted... [LB355]

SENATOR FULTON: Now was that part of Lincoln's ban? [LB355]

SENATOR AVERY: Yes. [LB355]

SENATOR FULTON: Okay. I'll need to check back then. [LB355]

SENATOR AVERY: That's part of the statewide ban. [LB355]

SENATOR FULTON: That's part of the statewide ban, but Lincoln specifically. [LB355]

SENATOR AVERY: I'm not sure. [LB355]

SENATOR FULTON: Okay. I'll check into it. So, I guess, we're...I popped my light on. I

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thought maybe there would be more people ahead of me. But I don't believe that was part of Lincoln's ban, tobacco retail outlets. Now if indeed that was part of Lincoln's ban then I would gladly stand corrected. But I don't believe that was envisioned specifically within Lincoln's ban. Now enter the Nebraska Clean Indoor Air Act, which passed last year. Within the state statute we did include tobacco retail outlets as part of our exemption. So in other words, Lincoln's ban said, tobacco retail outlets, you can't have smoking in there. That was part of the ban. The law that we passed, which Senator Avery and myself, incidentally, both supported, usurped what was done at the local level. So insofar as one can argue that we would be usurping local control by passing LB355, that same argument could be leveled specifically because of tobacco retail outlets which regard to LB395 of last year. So it's either X or not X. Either you are usurping local control or you're not. And I submit that we're not and those of us who voted for LB395 last year did not either. I'm going to go back and do a little more research but...on tobacco retail outlets. But to be clear, this is not the usurpation of local control. This is about setting statewide policy with reasonable and legitimate exceptions. I do believe this is a reasonable and legitimate exception made more so by the enacting of Senator Wightman's previous amendment. And so I will be opposed to this amendment. I will support LB355. Thank you, Mr. President. [LB355]

SENATOR CARLSON: Thank you, Senator Fulton. Members, please keep your side conversations at a level that the speakers can be heard. Those still wishing to speak are Senators Howard, Stuthman, Coash, Gay, and Avery. Senator Howard, you are recognized. [LB355]

SENATOR HOWARD: Thank you, Mr. President, members of the body. Senator Avery, you may find this information very interesting. Every year I do a newsletter and send a survey with that newsletter. And I get a great response from District 9, they are always receptive, always there to give me their support and their information and their input, which I very much appreciate. When we were debating the smoking ban issue I included that question in the questionnaire. And the response that I got from District 9 was that 74 percent of those responding in District 9 support the smoking ban. So that information, I think, you could factor into the information that you have. And if Senator Lautenbaugh would yield to a question. [LB355]

SENATOR CARLSON: Senator Lautenbaugh, would you yield? [LB355]

SENATOR LAUTENBAUGH: Yes, I will. [LB355]

SENATOR HOWARD: Thank you, Senator Lautenbaugh. I don't believe this has been covered. But if I could just again ask you questions that I'm receiving from District 9. [LB355]

SENATOR LAUTENBAUGH: Sure. [LB355]

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SENATOR HOWARD: Is a revocation of a cigar bar and a liquor license automatic if a cigar bar is found to have violated the law? [LB355]

SENATOR LAUTENBAUGH: Automatic, well, no, to answer your question directly, no it's not automatic. It's a...within the array of possible penalties depending on the degree of violation and the history, etcetera. [LB355]

SENATOR HOWARD: How would that work if they were found in violation? What would transpire? [LB355]

SENATOR LAUTENBAUGH: Well, it would be again like any other violation under the Liquor Control Act. There could be a warning period, there could be suspension period. It just depends. I believe they're given absolute...I don't want to say absolute. I believe they're given discretion on what penalties they invoke. [LB355]

SENATOR HOWARD: And again, that's the Liquor Control Commission that's given that discretion? [LB355]

SENATOR LAUTENBAUGH: Yes. [LB355]

SENATOR HOWARD: Okay. [LB355]

SENATOR LAUTENBAUGH: That's my understanding. [LB355]

SENATOR HOWARD: Well, how many licenses has the Liquor Control Commission revoked this year, if you know the answer to that. [LB355]

SENATOR LAUTENBAUGH: Three hundred and forty-two, actually I'm making that up. I really don't know (laughter) that information. [LB355]

SENATOR HOWARD: That's amazing that you would have that number. [LB355]

SENATOR LAUTENBAUGH: It would be amazing, I'll give you that. [LB355]

SENATOR HOWARD: I'm sorry, I didn't hear your actual answer. [LB355]

SENATOR LAUTENBAUGH: Oh no, it would be amazing. I have no idea what the actual number is. [LB355]

SENATOR HOWARD: All right. Then if the Liquor Control Commission was going to revoke a license...a cigar bar license when they...to my understanding they almost never, seldom shall we say revoke a liquor license. Would that...do you expect that a

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cigar bar as well, they would follow down the same sort of legal path as a bar would?
[LB355]

SENATOR LAUTENBAUGH: Well, again I believe it would depend on the scenario. I mean they could certainly revoke the classification as a cigar bar and disallow smoking, I mean, and then it would just be a bar. If it was an actual attempt to deceive or falsify numbers, I understand they take a very dim view of that. And lying to the Liquor Control Commission, I think, is the shortest way to get a revocation. The most...that's not the most common thing they've run into, it would be under this act, under this bill. So I would assume there would be...revocations would probably be more common in this area than in general because of the way they normally handle other types of complaints.
[LB355]

SENATOR HOWARD: Okay. [LB355]

SENATOR LAUTENBAUGH: That revocation again, I'm overstating, I'm assume that there would be some suspension then leading to revocation is there was falsification in this area more likely than others because I don't know how much you can falsify in the other areas. I assume there is some. [LB355]

SENATOR HOWARD: And then if there were complaints that came in from individuals as well as, say, information from state troopers, that would also factor into a possible revocation? [LB355]

SENATOR LAUTENBAUGH: Yeah, I understand it would work just like anything else under the Liquor Control Act. [LB355]

SENATOR HOWARD: Okay. Do the federal and state taxes paid when purchasing tobacco products at a cigar bar count toward meeting the minimum threshold? And this was asked by someone who also added that Congress had just raised the cigarette tax by a dollar last month. [LB355]

SENATOR CARLSON: One minute. [LB355]

SENATOR HOWARD: I heard that they did that. Thank you. Thank you, sir. [LB355]

SENATOR LAUTENBAUGH: Well, it would be within the definition of gross revenue so I...I'd have to think whether or not taxes actually would count towards the 10 percent or not. I don't know. I mean it's a great way to track what the actual revenue is. But as I stand here, I'm not 100 percent certain from an accounting standpoint that would count in that way. [LB355]

SENATOR HOWARD: Thank you, Senator Lautenbaugh, for being so eager to answer

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the questions from my district. I appreciate that. And if we have more questions that come in, I will again ask you those. Thank you. [LB355]

SENATOR CARLSON: Thank you, Senators Howard and Lautenbaugh. Senator Stuthman, you are recognized. [LB355]

SENATOR STUTHMAN: Thank you, Mr. President and members of the body. I have been in this legislative body for...this is my seventh year. And, you know, there are a number of senators here that have never, never witnessed the situation that the majority of us have, and that's the fact of the debate from what I would call a professional filibuster, Senator Chambers I'm referring to. Really, really, Senator Chambers, you know, he only needed himself on the floor. He took up a lot of the time and I respect him for that. I think that this is an issue and this is a time when I, you know, would say that in my opinion I would be kind of glad if Senator Chambers was still here. But the fact that his replacement, my seatmate, I respect her highly. I think this is a health issue. I think we're coming to a point, you know, where we're hopefully trying to move in the direction, you know, of eliminating smoking. But you can't do that, you know, just one...you just can't do it in one legislative bill. We have come a long way with LB395 and especially with the fact that we have allowed businesses, bars to adapt to the change of LB395 and that was they could remain open, get adjusted to the nonsmoking environment, the health issue, the workplace nonsmoking environment of the fact that till this June 1 of this year when the bill would go into effect. I think that was very considerate of the people that, you know, passed the bill. It could have been probably passed, you know, that it would have went into effect a year earlier or close to a year earlier. But I think in respect to those individuals, you know, we have allowed them to go another year. I think that was very good of the legislative body to do that. But now when we are looking at the fact that, you know, this is going to take place, we're trying to find a way so that a few of the businesses, you know, can stay in business. I don't think it's our responsibility as a legislative body to guarantee a business to stay in business. That's a business decision. That's not a legislative duty to make sure that everyone is successful in their business. I don't think that's our responsibility that we have to do that, and I don't think it should be. It should be a business decision. Every individual has the right to establish a business of their interest, and they may have an opportunity to do that. But in order to be successful, they have to adjust to the climate. I do also want to mention while I have a little bit of time here on the floor is the fact of what occurred yesterday, yesterday afternoon, a situation with the weather. We had some individuals that experienced a tornado in the Eagle area, and I have sympathy for these people that have had their property destroyed. I, personally, went through that in June of 1998. [LB355]

SENATOR CARLSON: One minute. [LB355]

SENATOR STUTHMAN: And until you go through an experience like that with debris spread all over the community, as some of the pictures I have seen and some of the

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barns that were destroyed, some of the property that was destroyed, you don't realize that until you have gone through that. But I also say that people in the community have great respect for individuals that go through a situation like that. They come with open arms. They come with equipment to help clean up the debris. I'm very sympathetic to those individuals. And I thank the individuals that help with that, with the cleaning up efforts of that. I also have experienced in the first years of my legislative duty down here, I did have an apartment, you know, rented in western Lincoln. [LB355]

SENATOR CARLSON: Time. [LB355]

SENATOR STUTHMAN: Thank you, Mr. President. [LB355]

SENATOR CARLSON: Thank you, Senator Stuthman. Those senators still wishing to speak: Senators Coash, Gay, Avery, Karpisek, and Stuthman. Senator Coash, you are recognized. [LB355]

SENATOR COASH: Thank you, Mr. President. I'd like to call the question, please. [LB355]

SENATOR CARLSON: The question has been called. Do I see five hands? I do. The question is, shall debate cease? All those in favor vote aye; all those opposed vote nay. Are there others wishing to vote? Record, Mr. Clerk. [LB355]

CLERK: 26 ayes, 5 nays, Mr. President, to cease debate. [LB355]

SENATOR CARLSON: Debate does cease. Senator Avery, you're recognized to close. [LB355]

SENATOR AVERY: Thank you, Mr. President. This amendment does nothing more than empower local communities to continue to make the decision on this issue for themselves. It is about local control. And I would like to address in my closing some questions that were raised about Lincoln and whether or not Lincoln actually voted on the cigar bar issue specifically. As I recall, and I have some information here that verifies that, the first ordinance that was proposed by Lincoln did have a number of exemptions. And those exemptions included, Senator Fulton, the smoke shop, smoking rooms in a place of employment, various exemptions, and that was vetoed by the mayor. Then the city council came back with another ordinance that did not have any exemptions except for 20 percent of guest rooms in hotels and then an exemption for scientific research--no other exemptions, no exemptions for cigar bars, no exemptions for smoking rooms, no exemptions for smoke shops. The...that prompted an initiative, an initiative that got enough signatures to put it on the ballot. And in the debate on that initiative, there was talk about cigar bars. This was a referendum on smoking in public places. It was a referendum on smoking in restaurants, it was a referendum on smoking

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in smoke shops, it was a referendum on smoking in bars. This was about smoking in public places, and it included all kinds of places. It included cigar bars, and the voters said 62 to 38, we want this, and they voted down that petition to repeal it. Now that's the truth. That's what happened. And so you build these bogus arguments that try to undermine the importance of the vote here in Lincoln by saying it didn't actually deal with the issue we're talking about and it did. And I would just say that in reference to comments about e-mail, I've been getting e-mail too. And I can tell you it's running overwhelmingly opposed to LB355. One more comment about the Washington Internet poll. Internet poll--that's evidence? That's about like looking at blogs and saying this represents the entire opinion or cross section of opinion in a community. Internet poll doesn't mean anything. It's not scientific. I have handouts here if you want to see a bona fide scientifically determined poll. I have handouts for you. I might distribute them later, I don't know. But certainly an Internet poll does not impress me. And if you read blogs, you can very quickly determine what Internet polls are worth--not very much. It's just about what we had there. This amendment is not anything more than restoring to communities the right to permit smoking or not to permit smoking, depending on their choice, and they can restrict it by ordinance or resolution. I think this ought to be passed. I think we ought to uphold the right of communities to make these decisions to protect the public health of their citizens. Thank you. [LB355]

SENATOR CARLSON: Thank you, Senator Avery. You have heard the closing on the amendment. The question is, shall the amendment be adopted? All those in favor vote aye; all those opposed vote nay. Have all those voted that wish to vote? Senator Avery. [LB355]

SENATOR AVERY: Request a call of the house, Mr. Chair. [LB355]

SENATOR CARLSON: There's been a request to place the house under call. The question is, shall the house go under call? All those in favor vote aye; all those opposed vote nay. Record, Mr. Clerk. [LB355]

CLERK: 36 ayes, 0 nays, Mr. President, to place the house under call. [LB355]

SENATOR CARLSON: The house is under call. Senators, please record your presence. Those senators outside the Chamber please return to the Chamber and record your presence. All unauthorized personnel please leave the floor. The house is under call. The house is under call. Senators, please return to the Chamber and record your presence. Senators Heidemann and Ashford, please return to the floor. The house is under call. Senator Avery, all members are accounted for. How would you like to proceed? [LB355]

SENATOR AVERY: A board vote, Mr. President. [LB355]

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SENATOR CARLSON: Do you accept call-in votes? [LB355]

SENATOR AVERY: Yes. [LB355]

SENATOR CARLSON: Call-in votes are accepted. [LB355]

CLERK: Senator Rogert voting no. [LB355]

SENATOR CARLSON: Are there others wishing to vote? [LB355]

CLERK: Senator Cornett voting no. Senator Heidemann voting no. Senator Wightman voting no. Senator Christensen voting no. [LB355]

SENATOR CARLSON: Record, Mr. Clerk. [LB355]

CLERK: 11 ayes, 25 nays, Mr. President. [LB355]

SENATOR CARLSON: The amendment fails. The call is raised. [LB355]

CLERK: Senator Stuthman, I understand, Senator, you want to withdraw your amendments at this time and refile them. Is that right? [LB355]

SENATOR STUTHMAN: Yes, I would appreciate that, Mr. Clerk. [LB355]

CLERK: At this time, Mr. President, I have nothing further pending to the committee amendments. [LB355]

SENATOR CARLSON All right. We return to discussion on AM445. Those wishing to speak are Senators Gay, Avery, and Stuthman. Senator Gay, you are recognized. [LB355]

SENATOR GAY: Thank you, Mr. President. I just wanted to rise--I didn't know Senator Stuthman was going to pull those amendments--but just looking at this vote, I still think--and I commend Senator Wightman on his amendment--but it's 25 yes, 9 no, 11 not voting. Here we go 25-11 and 10 not voting. I think those 10, 11 not voting are just still very uncertain of where we're at on this bill, me included. Exemptions aren't supposed to be easy, and this certainly isn't. Senator Lautenbaugh is working on it. But I think I still have some grief with the cigarette portion of it. On Select File, I guess, is where I'm going to file this since it looks like we're going to move on probably. But the cigarette portion, if we remove that, I still think it makes it a much better bill. On the first day I said I'd make it a much better bill. I didn't commit to voting for or against whatever. I still think, colleagues, that we need to further define this a little bit. I keep hearing it referred to as the cigar bill, but yet for some reason cigarettes still continue to be in

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there. Somebody could probably walk into a place, they wouldn't appreciate this, I'm sure, if you're a cigar bar owner, to come in, start smoking a few cigarettes, have some drinks. But that's just a bar then at that point, and that's what we've been working to get rid of in the last two years to...I think the public is behind that portion of it. So by allowing that, I think we're...that's where I think the door is starting to open a little bit. Removing that I think the bill is a lot more palatable to people, and we can understand the cigar bar exemption. People willingly go in with a legal product, a cigar, and enjoy that. But I do have some concern with that, and I will draft an amendment relating to that. And also the 10 percent threshold was lowered. I still think that...I'm open to that. Earlier today I'd checked into humidors because if you can't have a walk-in humidor, you can't have this. Well, I checked into those. Those are anywhere from a high, sure there's a high of \$82,000, but I was on, oh, it's called Tobacco Retailer, just on the Internet checking that out, you can make one for \$6,000 to \$8,000, well, even \$1,000 to \$3,000 there. Here's another one a guy built on his own for \$6,000 with furnishings up to \$8,300. That's not a huge investment in a business, \$8,000. And if that is, I am still concerned that these will pop up a little more and someone will find some kind of way around this legislation. So I'm concerned. I'm going to watch, continue to see what's happening. But just watching the votes here, I'd say there's 10 or 11 of us who have the same concerns. I've even heard people who are for the bill had concerns still, but yet they want to help out. So I think we need to watch, see what's going on. I will be filing those amendments and we can talk on them, I assume on Select File it's looking like, so we can move on. But I just wanted to get up. I knew we had these other amendments coming that were now going to be refiled. But that will be filed for your knowledge, and hopefully we can have a discussion on that and see where we end up. Thank you, Mr. President. [LB355]

SENATOR CARLSON: Thank you, Senator Gay. Senator Avery, you are recognized. [LB355]

SENATOR AVERY: Thank you, Mr. President. Despite what many of you may think, I'm a realist and I can count--11 is not 25. It's a long ways from it, Senator Lautenbaugh. And I am going to refrain from additional amendments at this point. But if the votes are there to advance this to General...to Select File, I will have one more amendment that will provide for communities that have approved their smoking ban by referendum to continue those bans. That's not asking for a lot. All those communities that have not done that can still have cigar bars, but those that at least went through the petition process ought to be allowed to continue. That's what I will do on Select File. Thank you, Mr. President. [LB355]

SENATOR CARLSON: Thank you, Senator Avery. Senator Stuthman, you are recognized. [LB355]

SENATOR STUTHMAN: Thank you, Mr. President and members of the body. I think Senator Gay brought up a real good issue on the fact of the humidors. A humidor is only

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a place that hopefully keeps the humidity at a certain level, at a level of a range is what it is. You know, there's a lot of homes in the state of Nebraska that have a basement and they're wet in the basement and they just purchase a dehumidifier to take out the moisture in the basement. And really all you need is just an enclosed room to keep the humidity level at a certain level, a certain range. I think that is the issue. It would be very simple to build. All you need is four walls, a door where you can walk into with a humidifier or a dehumidifier, something that keeps the humidity at a certain level--very, very simple to install. It's not a \$100,000 project that you have to put in there. I'm sure there's rooms in these bars that you could use the existing room and put in one of these small humidifiers or dehumidifiers to keep it at that certain level. I think this is a situation where we are allowing people to make a business decision on how to adapt with this bill, if this bill would be fortunate to pass. I think the biggest issue is the health issue. I think that is the issue that we have to deal with, not whether the fact is we should allow, you know, four or five or it's going to end up in maybe a hundred businesses being able to allow smoking in those establishments then again. I think those are issues that we really have to address. I really think, I really think in my opinion, and I haven't filed that type of an amendment yet, but I think this bill should be recommitted to the committee. I think this bill needs a lot of perfection in it if we are going to allow something like this to happen. And I don't think we should try to be doing that in a couple of years from now and say, oh, my gosh. You know, now we have opened it all up again and we have smoking all over. And we have allowed, you know, those businesses to adjust to a bill that we have passed in the legislative session of 2009. I think this is also a situation where we've got to be very careful as to what we're attempting to do. Are we selecting a certain group, immaterial of what it could be, and this deals with cigars or cigar tobacco-related products and allowing people to smoke in there? The same situation could attract the attention of another bill to be introduced next year and have a hearing. Maybe there's another group out there that would like to change something as far as, you know, allowing smoking, which is hazardous to your health. I do respect the fact that it is a legal product, and it doesn't bother me a bit if somebody wants to smoke. [LB355]

SENATOR CARLSON: One minute. [LB355]

SENATOR STUTHMAN: But the issue, in my opinion, is the fact of the secondhand smoke. Yesterday it was brought up the fact that, you know, alcohol issues. But I have never, you know, and I've never heard a person yet that it was a health issue on secondhand alcohol. Secondhand smoke is an issue. It's in the air. It's a pollutant, and it does affect the person by you. I think we got to be very careful on this bill as to what we're trying to do, what type of a precedence we're trying to set as far as allowing some type of exemption. Thank you, Mr. President. [LB355]

SENATOR CARLSON: Thank you, Senator Stuthman. Those wishing to speak: Senators Nelson, Haar, and Gloor. Senator Nelson, you're recognized. [LB355]

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SENATOR NELSON: Thank you, Mr. President, members of the body. I rise in support of adopting AM445 and also in advancing LB355 to Select. I think we really had a lot of great discussions here. We've learned a lot about cigar bars, about humidors probably. By advancing this to Select, it will give a number of us an opportunity to give this more thought and get more details, a little more information. And I think if Senator Gay plans to bring some amendments that will narrow this even more, that's fine. I think we need to make as good a bill out of it as we possibly can, make it as narrow as we can, and still preserve the rights of business owners to have a legitimate business. So I would urge your support of AM445 and LB355. Thank you, Mr. President. [LB355]

SENATOR CARLSON: Thank you, Senator Nelson. Senator Haar, you are recognized to speak. [LB355]

SENATOR HAAR: Mr. President, members of the body, I rise to oppose AM445 and also LB355. I'm one of those that feels that this has too many loopholes that we're opening up smoking, the possibility again of smoking in bars. And I take very seriously the fact that the people of Lincoln, Nebraska, voted...62 percent voted in support of a smoking ban. And for someone who won his legislative seat by only 20 votes, I look at 62 percent as a significant majority of the voters. And I think that should be respected by this body. Let's use the old analogy of if it looks like a duck and quacks like a duck, it's probably a duck. This looks to me like it's an end run of the smoking ban that was passed last year, and that's what I believe it is. Thank you very much. [LB355]

SENATOR CARLSON: Thank you, Senator Haar. (Visitors introduced.) Senator Gloor, you're recognized to speak. [LB355]

SENATOR GLOOR: Thank you, Mr. President and members of the body. I've had several within the body who have asked me why I haven't been heard on this subject and obviously were either not around or I was speaking too softly last week when I was pretty adamant about my concern on this bill and any of the amendments. I have to say, though, that I admire Senator Lautenbaugh for his polite but adamant insistence, persistence on this subject. And I have no doubt and I would say this not for the body, obviously, for viewers, listeners, reporters, that I have no doubt in my mind that Senator Lautenbaugh, were LB355 to go through with any number of amendments attached to it, that he would be very happy if there were only one cigar bar left four or five years from now because it would underscore his insistence, and I believe him again, that there are to be no loopholes, that this is to be specifically a cigar bar bill. Having said that, I again have to rise and point out that I have a career devoted towards health and health of the general population. And any variation on smoking bans to me is wrong and a great concern. And I know the issues of interference with private ownership, private property, private choice does not play well. But decades and decades and decades of people exercising bad decisions and then throwing themselves upon a system that they expect

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to help them at someone else's expense, at someone else's time and energy just makes this a problem for me. By the same token, I feel equally insistent when it comes to mandatory seat belt laws and helmet laws for all of the same reasons and rationales. Before you get too hung up on thinking about the private and personal aspect of this, remember that in all my years in healthcare, no one ever came to me and said, you know, I'm glad I made the bad decisions that I did in my youth and my younger years. I've earned the ill health I have and expect to take my medicine literally and figuratively now. We have to, for better or worse, make difficult decisions on behalf of the general public, it's why it's called public health. I rise in opposition to LB355. Thank you. [LB355]

SENATOR CARLSON: Thank you, Senator Gloor. There are no other lights on senators wishing to speak. Senator Karpisek, you're recognized to close on AM445. [LB355]

SENATOR KARPISEK: Thank you, Mr. President, members of the body. Again, AM445 makes four main changes to LB355. First, it replaces Section 4 contained in LB355 with a new section that prohibits counties from passing resolutions or cities from passing ordinances. The amendment adds cigar bars to the list of exemptions. It also changes the measurement of sales from gross profit to gross revenue. And finally, the amendment requires proof of gross revenue to be sent to the Nebraska Liquor Control Commission. That is the extent of the amendment with the other amendments that have been added to it, and I would ask that you pass it. Thank you, Mr. President. [LB355]

SENATOR CARLSON: Thank you, Senator Karpisek. You have heard the closing on the amendment. The question is, shall the amendment be adopted? All those in favor vote aye; all those opposed vote nay. Are there others wishing to vote? Record, Mr. Clerk. [LB355]

CLERK: 27 ayes, 10 nays on adoption of committee amendments. [LB355]

SENATOR CARLSON: The amendment is adopted. [LB355]

CLERK: I have nothing further on the bill at this time, Mr. President. [LB355]

SENATOR CARLSON: We return to discussion on LB355. Seeing no lights, Senator Lautenbaugh, you are recognized to close. [LB355]

SENATOR LAUTENBAUGH: Thank you, Mr. President and members of the body. This is a quintessential less is more moment. Please vote green. Thank you. [LB355]

SENATOR CARLSON: You have heard the closing on LB355. The question is, shall LB355 be adopted? All those in favor vote aye; all those opposed vote nay. Are there other members wishing to vote? Record, Mr. Clerk. [LB355]

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CLERK: 26 ayes, 14 nays on the advancement of the bill, Mr. President. [LB355]

SENATOR CARLSON: LB355 advances. We move on to LB260. [LB355 LB260]

CLERK: Mr. President, LB260. Senator Nordquist, I have Enrollment and Review amendments, first of all. (ER8026, Legislative Journal page 662.) [LB260]

SENATOR CARLSON: Senator Nordquist. [LB260]

SENATOR NORDQUIST: Mr. President, I move the E&R amendments to LB260. [LB260]

SENATOR CARLSON: (Microphone malfunction)...motion. All in favor say aye. Opposed, the same. Motion carried. [LB260]

CLERK: Mr. President, Senator Lathrop has the next amendment, FA21. Senator, I have a note that you'd like to withdraw and offer as a substitute AM785. [LB260]

SENATOR CARLSON: Any objections? So ordered. [LB260]

CLERK: Senator, AM785. (Legislative Journal pages 820-824.) [LB260]

SENATOR CARLSON: Senator Lathrop, you are recognized to open. [LB260]

SENATOR LATHROP: Thank you, Mr. President and colleagues. You'll remember LB260 is Senator Rogert's exoneration bill. This bill when on the floor in General File generated a great deal of discussion followed by a promise made by Senators Lautenbaugh, Rogert and myself to sit down and try to make an accommodation in the form of an amendment that will address many of the concerns expressed during General File debate. I would like to walk you through the amendment so that you can see that the amendment is responsive, and at the same time maybe give you a little refresher on the bill. If you look at the amendment you will see Sections 1 and 2 are the same. Section 3 is what we would call or refer to as the elements of a case. These elements have changed and, we believe, narrowed the scope of the bill and making it more difficult for a person to recover following on one of these exoneration claims. In order to make that claim a plaintiff, someone who has been pardoned, would have to establish four elements. The first is that he/she was convicted of a felony and actually did time. That's important because we're not providing this remedy or making it available to people with misdemeanors or small matters. The second element is that the Board of Pardons must have pardoned the claimant or the court had vacated the conviction or the conviction was reversed and remanded with...and no new trial followed. And here is the safeguard that I think you were all looking for, and that's in paragraph 3. The claimant will have to establish by clear and convincing evidence that

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they were actually innocent of the crime or crimes under which they were incarcerated. And Section 4 remains the same. That section deals with or that subsection deals with instances where the person was coerced into a guilty plea or into a confession. Section 4 deals with the damages. You will recall that in the original bill, an original in LB260, we set forth a number of items of damages and also how much would be a base amount to recover for ones loss of freedom. We have substituted...after giving this good and due consideration we have substituted language simplifying it so that a person making this claim will be entitled to those damages which approximately result from the wrongful conviction. We're not saying the court has to give them anything. There is no \$25,000 a year or \$50,000. The standard for the court to use in one of these trials is simply going to be those damages found approximately result from the wrongful conviction. That's found in Section 4. There was a great deal of concern about capping damages. We heard, I think, Senator Fulton had an amendment to cap damages at \$1 million, others expressed that that was too high. The amendment caps damages at \$500,000 per claimant per occurrence so that anyone making one of these claims, the most that the court can find for damages is \$500,000. And I'll remind you that because this is a claim against the state and will pass through the State Tort Claims Act, it is a matter which will be tried to a judge and not a jury, so we're not going to get one of those over-the-top-type results. Five hundred thousand dollars seemed to be the consensus and that's the amount that ended up in the bill. And as an aside I might editorialize here, as a lawyer that's practiced law in this field, that is the field of claims, I generally would be adamantly opposed to, adamantly opposed to a cap. I think in this instance a cap may be appropriate because we do not, in this type of a claim, establish fault on the part of the state, but merely establish that a person was wrongfully convicted. And because of the nature of the claim, I am willing to accept a cap. Senator McCoy had some concern about whether the claim would be a signable or survive the claimant's death. In Section 4 paragraph 5 it is very clearly and explicitly set out that the claimant's cause of action under the wrongfully convicted act shall not be assignable nor shall it survive the claimant's death. There have been some other changes. One other concern that people had was that a person could make a claim under this act, and then run over to the federal courthouse and make a second claim. Section 7 deals explicitly with...and provides that a person can make a claim or choose whichever remedy they want to choose, but if they choose to bring a cause of action under the act created by LB260, they're precluded from making any other claims against the state of Nebraska under any other theory or any other act, federal or state. I believe that covers the amendments. This being Senator Rogert's bill, I'll yield the balance of my time to Senator Rogert, if he wishes to comment further on the amendment. [LB260]

SENATOR CARLSON: Thank you, Senator Lathrop. Senator Rogert, 4 minutes and 50 seconds. [LB260]

SENATOR ROGERT: Thank you, Mr. President. Thank you, Senator Lathrop. Members, I made a promise if we moved this to Select File that we would take as many

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of the concerns in as we could, and I think we've done that pretty well through about seven different drafts of this over the past few day. And with consult with Senator Lathrop, Senator Lautenbaugh, the AG's Office, the Innocence Project, Douglas County Attorney's Office, Senator Pirsch, and others I think we've taken into consideration those concerns by those folks and those of Senator Fulton, Senator Gay, Senator Gloor, Senator Carlson, and Senator McCoy that all had...some still have some amendments filed or had earlier. And if you take a look at the bill, I think we've got all those things covered. I'll just kind of reiterate a couple of things Senator Lathrop mentioned. We still have the burden of proof of clear and convincing evidence for innocence. And the preponderance of evidence for the damages. And we added at least one point to the burden of proof for innocence to help with Senator Pirsch's concerns in the first section, or the second section. I will mention that Section 6 at the moment is the avenue that creates for expungement. And we're working on a possible amendment with the media groups to maybe strike that and change it a little bit depending on where we get with this today and into tomorrow if it takes us there. We may have an amendment filed to work with that as well. If not, we may have to do it on the Final Reading. Senator Lathrop mentioned that we created this as the only avenue. Once anybody recovers a claim from this, that's it, that's all they're going to be able to do. At that point, they wouldn't be able to come back and sue another...make another suit against the state. And there's some additional language put into the final section that deals with the statute of limitations and how long they have to file, and it talks about those that would have a cause of action if they had it before this act was put into place. With that, I'll yield my time and answer any questions that we can as we move through this. Thank you, Mr. President. [LB260]

SENATOR CARLSON: Thank you, Senator Rogert. Senators wishing to speak: Pirsch, Price, Janssen, Wallman, and others. Senator Pirsch, you are recognized. [LB260]

SENATOR PIRSCH: Thank you, Mr. President, members of the body. I just stand today, I guess. During the General File debate I had objected to certain portions of the bill as it stood then based upon...I guess, others had kind of, the majority of the body had focused on the judgment provisions and placing caps and whatnot. My concern at that time was one of good process, one of good procedure. You know, I certainly understand the underlying premise, which is for those people who have been wrongly convicted who are actually innocent to have the state remunerate them for their sentences. And I don't have a problem with that underlying concept with the draft as it existed during General File. I did have a problem with the procedure for identifying those individuals because it kind of piggybacked on a pardon or a judge setting aside a conviction and assumed if that and...where those two instances, either one occurred that there would be a...that in and of itself was a determination of actual innocence. And so that was the problem with the prior draft that I was getting at. I thank Senator Rogert for, you know, taking my concerns and addressing them. With respect to this latest amendment, it does set up a procedure and a process. Whether you like the result or not, it does in

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fact have a procedure or process whereby someone is in charge of adjudicating actual innocence knowing that that is what they're doing. So there is a standard which I brought up was not present with the prior draft for determining what does that mean to be actually innocent. Is that innocent beyond a reasonable doubt, innocent by clear and convincing evidence, by a preponderance of the evidence? There a number of different standards. This draft does say that clear and convincing proof of actual innocence will be the standard. Secondly, it does, unlike the prior draft, have an institution responsible for making that call, that determination. We're saying this person, we're deeming this person actually innocent. And that would be in this court a civil court judge. So those concerns that I had with respect to those that I announced on General File I do thank Senator Rogert for addressing those here in the bill. Now, there's other measures that I might just have a few questions about, but I did want to make that clear with respect to the issue that I brought forward on General File that I think that that has been addressed by Senator Rogert here on Select File. Thank you. [LB260]

SENATOR CARLSON: Thank you, Senator Pirsch. (Visitors introduced.) Senator Price, you are recognized. [LB260]

SENATOR PRICE: Thank you, Mr. President and members of the body. I was wondering if Senator Lathrop would yield to a question. [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR PRICE: Senator Lathrop, I'd like to ask you to take a moment to clarify for me so I understand one aspect of this bill and the amendment. And that is in the idea of if you are...well, we'll get right to it. I believe it will be page 2, paragraph 3, line 27 where we're talking about, "No damage will be payable to a claimant for any period of time during which he or she was concurrently imprisoned for any unrelated criminal offense." The question I had was when we say if any part of a sentence had been served once you've been convicted, what would happen if there were multiple charges and multiple convictions served concurrently for the same event? I mean, I'm thinking of let's say there was an armed robbery or something happened and you were wrongfully convicted for one thing, but there were other things and you had a concurrent sentence. Is that beyond the realm of possibility or could you just clarify that for me when we talk about concurrent sentences, please? [LB260]

SENATOR LATHROP: I'd be happy to. And if you look...maybe the answer is found in the elements. And one of the things you have to prove in order to make a recovery in paragraph 3 is that he or she was innocent of the crime or crimes proved under subsection 1. So whatever put you in there that you think you should be make a recovery for because you were innocent you have to be innocent of all of them. [LB260]

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SENATOR PRICE: Okay. [LB260]

SENATOR LATHROP: So if you, for example, you went in and robbed a bank and they convicted you of robbing a bank and having a gun, and you've proved that you didn't have a gun, you still haven't satisfied the element. Okay? [LB260]

SENATOR PRICE: Okay. [LB260]

SENATOR LATHROP: Now, if you were in there...let's say that you were actually innocent of bank robbery, but you had to go down there because you sold meth, you're not going to make a recovery for being incarcerated for a period of time that you're in there for something else that you were actually guilty of. [LB260]

SENATOR PRICE: Okay. Great. Thank you. That make it a little better for me. And then if you don't mind, Senator Lathrop, I did have another question in Section 6, and I know Senator Rogert said there may be an amendment coming up. But in page 3, Section 6, line 10 when we talk about expunging a record, why is it that we can have any person can request...I mean, I can understand the individual or a family member, but why did we choose the language any person? [LB260]

SENATOR LATHROP: I'd have to defer to Senator Rogert on that question. [LB260]

SENATOR PRICE: All right. Thank you. Senator Rogert, would you yield to a question? [LB260]

SENATOR CARLSON: Senator Rogert, would you yield? [LB260]

SENATOR ROBERT: Yes, I will. [LB260]

SENATOR PRICE: Senator Rogert, the question is on page 3, line 10, Section 6,... [LB260]

SENATOR ROBERT: I'm with you. [LB260]

SENATOR PRICE: ...it says "any person may petition," and I was curious why we chose "any person" over the individual, the family members. Why are we doing this? [LB260]

SENATOR ROBERT: Well, I think for the purposes to have this type of information expunged it's going to take an agent that you appoint, it may take a member of the court, it may take...and that's what a lot of it would be. If you tell throughout this act it says that all agencies who reported or took care of this who had some type of filing or media, you have to be able to allow each one of them to petition the court to get rid of

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their means of media. [LB260]

SENATOR CARLSON: One minute. [LB260]

SENATOR ROBERT: Does that make sense to you? A lot of people would be involved in this process to expunge each of the records that were filed in different stages. [LB260]

SENATOR PRICE: I'll have to admit to you, Senator Rogert, and time is limited and, no, I really don't fully grasp it. I'm not going to try to be combative or anything, but I would appreciate if in your amendments you would find another way to cover that, give the parties involved the opportunity but not anybody because I just wouldn't want anybody off the street to make applications and tie up the valuable time of our court system. Thank you, Mr. President, and thank you members of the body. [LB260]

SENATOR CARLSON: Thank you, Senator Price and Senator Rogert. Senator Janssen, you're recognized. [LB260]

SENATOR JANSSEN: Thank you, Mr. President, members of the body. I'm rising for a couple of reasons. One is because I bowed out of the cigar debate last week and I haven't spoken since, so it's good to stand back up and speak once again. The other reason is actually could Senator Lathrop yield to a question? [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR JANSSEN: Thank you, Senator Lathrop. We had talked about this as an aside and I just wanted to get it out for clarification purposes, and possibly he went over this in his introduction. The payout of the settlement, could you explain to that to me again as we did earlier? [LB260]

SENATOR LATHROP: I will. I will. When we sat down to do this amendment, Senator Lautenbaugh and I basically tried to create or to draft an amendment to make this more consistent with what happens in a typical state tort claim over an injury of one kind or another. That process is what we find in the bill. And basically what happens is you have one shot at it. Unlike work comp which pays out over time, this would be one cause of action, one chance in front of a district court judge, judge makes a decision. Before you ever get to the judge, the state defending this could say, let's settle it, much as they did yesterday with the Manes case. So it's a one-time, one shot, one trial, and that's it. [LB260]

SENATOR JANSSEN: Thank you, Senator Lathrop. That answers my question. And

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when this bill originally came out I had some issues with it and I have not read through the amendments, but I do believe it's a much stronger bill and a more palatable bill for me at this time. I did have a question, and I don't have anymore questions for Senator Lathrop, but I did question him earlier. I asked, what if somebody were to get out or become innocent and then they were getting a payout, would those payouts stop if that person were to recommit another felony or commit a felony in this case. And he rationalized with me, no, that would not be the case because one has nothing to do with the other and the person is presumed innocent. I guess that's...and that's true in the eyes of the law. I'm not an attorney so I kind of look at it from a practical standpoint. We talk a lot about the Beatrice Six. I guess I don't look at those people as totally innocent. And I think my good friend Senator Wallman would agree with that, that on the surface it may sound like, boy, somebody was wrongly convicted. This was horrible. They were put in prison all these years. These were not good people, and they are not good people. They may have been in prison for a crime they did not commit, but I don't necessarily know that that does not make them a criminal. And I just wanted to put that out there. I am going to vote for this bill, but I wanted that to be put out there. And that's all I have. Thank you, Mr. President. [LB260]

SENATOR CARLSON: Thank you. Those wishing to speak yet are Senators Wallman, Gay, Fulton, Loudon, and Harms. Senator Wallman, you are recognized. [LB260]

SENATOR WALLMAN: Thank you, Mr. President and members of the body. Would Senator White yield to a question? [LB260]

SENATOR CARLSON: Senator White, would you yield? [LB260]

SENATOR WHITE: Yes, I will. [LB260]

SENATOR WALLMAN: On page 4 it says on line 8, the Nebraska State Patrol or other law enforcement officers are involved and the court will provide the written notice of the, you know, of the police. So if I am a victim or the victim's family, do I have any rights to appeal this? [LB260]

SENATOR WHITE: I don't see them here, Senator, but certainly that could be provided for in the bill that the victims family could enter in appearance and ask to put in evidence in opposition. But I don't see it right now in the statute. I could be wrong. Perhaps Senator Lathrop could correct me. [LB260]

SENATOR WALLMAN: Would Senator Lathrop yield to a question? [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes, yes. [LB260]

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SENATOR WALLMAN: Do you see that any place in this amendment? [LB260]

SENATOR LATHROP: I'm sorry, I was distracted talking to Senator Gay and I didn't hear your question, Senator Wallman. [LB260]

SENATOR WALLMAN: Before you pardon somebody or the State Patrol or Pardon Board, would the victim's family would have or would they have the same access to the records as the State Patrol would or you would as an attorney? [LB260]

SENATOR LATHROP: I'm not sure what access victim's families have to records before a parole hearing. Let me suggest something, Senator Wallman, is that the pardon by the State Pardons Board or a vacation of your conviction by a court is only a sorting process, it's only a gate keeping function. So if you don't get one of those, you don't even get to file one of these lawsuits. So until one of those things happen, they don't have any evidentiary or independent...the fact that you've been pardoned doesn't mean a thing other than you get to get off of go and proceed down the board. Okay? You still have to establish that you were innocent by clear and convincing evidence. And the victim's family, if they believe that is not the case, would be able to aid the state in defending that claim and saying, Attorney General, say this, do this, here's some evidence, I'll testify. So the victim's families can be involved in the defense of one of these claims. Does that make sense? [LB260]

SENATOR WALLMAN: But once your pardoned, you still have an appeal to the pardon? [LB260]

SENATOR LATHROP: We're not changing anything about the appeals process or the pardons process, Senator Wallman. That is what it is. All we're doing with the pardons process is saying you have to have been pardoned or had your judgment vacated in order to even make one of these claims. Otherwise we'd have people filing all kinds of them. Okay? And to keep frivolous claims from being filed, we say you have to have met one or the other of these. That establishes that at least somebody vacated their judgment or pardoned them, but they still have to prove that they were innocent by clear and convincing evidence, which is, I will say, a difficult burden. [LB260]

SENATOR WALLMAN: Thank you, Senator Lathrop, Senator White. Thank you, Mr. President. [LB260]

SENATOR CARLSON: Thank you, Senators Wallman, White, and Lathrop. Senator Gay, you are recognized. [LB260]

SENATOR GAY: Thank you, Mr. President. I'd like to thank Senator Rogert, Lathrop, and Lautenbaugh for working on this. I think they've drafted a very good amendment

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here. I wanted to speak. I have an amendment three or four down the road here, and the intent of my amendment was to prevent double dipping. For example, you couldn't get educational, health, and all these other benefits we had talked about, and then also go receive a multimillion dollar judgment. So I was just interested in how we cap this. And I think this amendment does it. I have a question if Senator Lathrop would answer a question. [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR GAY: Senator, so you just heard what my intent was and I think this does that. If you can explain your \$500,000 cap, and this will prevent that from happening. And I've been reading through here. I assume that does, but is that correct? [LB260]

SENATOR LATHROP: It does. It is in Section 4, paragraph 4, there is a cap of \$500,000. So no matter what the judge does...if the judge thought the person was entitled to a million dollars for their wrongful conviction, they would only be allowed a recovery of \$500,000. [LB260]

SENATOR GAY: Yeah, and I think that's reasonable at some point. And I think the public would think...I think the public wants some reasonable assurance that this isn't going to be abused in any way, but yet I can't speak for everybody. But what I wanted was that you can go and rehabilitate yourself, and of course you're wrongly convicted, but you've spent that time away. We need to get them back on their feet and started, but how much is enough. And I think this does a good job of doing that. One more thing, on page 1, so this is...if you're convicted of one or more felony crimes you can go through this process. So it clarifies it to felonies? [LB260]

SENATOR LATHROP: Yes, it's only felonies, so we're not going to make this a process available to misdemeanors, which by definition involve incarceration of less than a year. [LB260]

SENATOR GAY: Yeah. Okay. Well, like I say, I commend you. Just reading through it it's very well written. And like I say, when we get to my amendment, I will be pulling my amendment just for the body pulling that. And all mine did was limit it to \$20,000 a year per year or whatever, but this is a very reasonable solution I think. And I will be pulling that amendment, AM586 I think it is. So thank you. Thank you, Mr. President. [LB260]

SENATOR CARLSON: Thank you, Senators Gay and Lathrop. Those wishing to speak, Senators Fulton, Loudon, Harms, Schilz, and others. Senator Fulton, you are recognized. [LB260]

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SENATOR FULTON: Thank you, Mr. President, members of the body. It's appropriate that I get up and speak in favor of AM785 and therefore in favor of the underlying bill, LB260. I had concern that there was no cap on the damages that could be awarded under this bill, and that has been rectified. I think Senator Lathrop already touched on it. Specifically it's on page, I think, 3 of your bill, Section 4, subsection 4. Senator Coash tells me that's correct. So that's great and actually I'd ask people to pay close attention to the way that the bill is worded, the way that amendment AM785 is worded. People should know this does not therefore mean that one who is wrongfully convicted is automatically going to receive \$500,000. Okay. This says that such award shall not exceed \$500,000. And so it would still be the prerogative of the judicial side of government to determine the amount of remuneration that one should be afforded after having been wrongfully convicted. It's a reasonable way forward. It's appropriate that I stand up and thank Senator Rogert and Senator Lathrop. And with that, I'll take no more time. Thank you, Mr. President. [LB260]

SENATOR CARLSON: Thank you, Senator Fulton. Senator Louden, you are recognized. [LB260]

SENATOR LOUDEN: Thank you, Mr. President and members of the Legislature. As I look the bill over, this amendment is a great improvement over the bill, and I would thank Senator Lathrop and his people to come forwards with this. I was wondering if Senator Lathrop would yield for questions if he would, please. [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes, sir. [LB260]

SENATOR LOUDEN: Senator Lathrop, as Senator Price mentioned Section 6, the "any person" I'd question that, and that's already been talked about. What I'm wondering, in Section 7 there and it says down there line 22 and 23, "reasonable value of services provided shall be treated as an advance against any award or judgment under the act." Just what does that mean then in this deal? My understanding it'd be that they could deduct some things that they've done for these people is this is some type of a health operation or what does that mean? [LB260]

SENATOR LATHROP: What it means is...that's a great question, by the way, and I'm happy to explain it because "advance" is a legal term in the litigation process, and we allow insurance companies to give money to somebody that may have a claim against them, they get a credit for it later. So the way Section 7 would operate or we would expect it to operate is let's say that everybody agrees that somebody has just been exonerated, and the Attorney General says, yeah, this guy never should have been convicted. And the state looks at him coming out of the penitentiary and they say, son, why don't I take you over and enroll you at Metro Community College and let's start you

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on a program of education or if they advance dollars for the person to rent a house. Whatever they advance in the form of services or they advance in the form of money is a credit against what they're ultimately required to pay. So it's a way of encouraging the state to take care of these people right out of prison and not wait for the litigation process to wrap up. [LB260]

SENATOR LOUDEN: Then in Section 4, paragraph 1, and subsection (b), "Value of any care or education provided to the claimant while he or she was imprisoned." And that can't be deducted against the damages, is that correct? [LB260]

SENATOR LATHROP: That's true. What we didn't want to do is say, which I think would have been pretty cynical to say you can recover for your wrongful conviction, but then we're going to charge you for room and board and for that GED you got, which, you know, you didn't want to be in prison so you got a GED or they fed you or they took your appendix out. Those aren't credits against what you'd be entitled. [LB260]

SENATOR LOUDEN: Okay. But the wording then in Section 7 doesn't reverse any of that wording in Section 4. [LB260]

SENATOR LATHROP: No. Section 4 has to do with things that you might have received while you were in prison. So if you needed medical care, that's not a credit against a judgment. But if you get out of prison and they help you along the way to get an education, they give you cash to go rent a place, they give you money to get on with your life, that would be a credit against whatever ultimately the state would be ordered to pay. [LB260]

SENATOR LOUDEN: Okay. And then in Section 9 there, line 1 and 2, and it said: the claimant making other claims available against any other party. What does that mean? Now, and as I read that it means that they can't...I can understand where they can't make another claim against the state for something else, but what about a claim in any other pardon. Is that negated I guess you would say any... [LB260]

SENATOR CARLSON: One minute. [LB260]

SENATOR LOUDEN: ...life insurance or other claims they had against some other company? [LB260]

SENATOR LOUDEN: Thank you for the question, it's a good one. No. What that means is if you make a claim against the state under this act, you're done. You do not get to make another claim against the state. Same question Senator Fischer had off the mike. You do not get to make another claim against the state. But let's say you know who lied and who framed you, you could still make a claim against them. [LB260]

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SENATOR LOUDEN: Okay. Then it says and "any other party." Is that what you mean by someone that was supposed to bore false witness against them or something? [LB260]

SENATOR LATHROP: That's exactly it. So if you had a witness that said I saw LeRoy Louden, he was at the bank, he was holding a gun, he held the place up and you get exonerated, you prove your innocent and, you know, you have a claim against the state under this act, but that doesn't stop you from making a claim--and this is a long shot--but making a claim against the person that put you there. [LB260]

SENATOR LOUDEN: Okay. I guess I probably run out of time. I have one... [LB260]

SENATOR CARLSON: Time. [LB260]

SENATOR LOUDEN: Thank you. (Microphone malfunction) [LB260]

SENATOR CARLSON: Thank you, Senators Louden and Lathrop. Senator Harms, you're recognized to speak. [LB260]

SENATOR HARMS: Thank you, Mr. President, colleagues. Senator Lathrop, would you yield to a question? [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR HARMS: Senator Lathrop, I'm going to ask a question I think that Senator Louden did, but I'd just like a little more clarification on Section 4. Would you explain that section real quickly for me? What does that actually mean? That's on page 2. [LB260]

SENATOR LATHROP: Okay. Section 4 is...you'll remember in the original bill we said that a person could make a claim for their loss of freedom, and for that they'll receive \$25,000 a year or \$50,000 a year if they were in death row, and they can make a claim and we itemized the things that you could make a claim for. What we've done is we've taken out the minimum so that a person is going to get \$25,000 a year, that's gone. We've replaced it with what Senator Lautenbaugh and I have experience with in tort claims, and that is any damages approximately resulting from your wrongful conviction. What that means is you'd have to establish to the satisfaction of the trial court what are the damages that you've suffered. You've suffered your loss of freedom and maybe emotional, you might have been assaulted in prison, those things that are the proximate result of your wrongful conviction you can make a recovery for. Really it's the same things, we've just not itemized them and we've taken out the minimum. [LB260]

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SENATOR HARMS: Okay. I had one other question, Senator. The amount that the person is going to receive is a maximum of \$500,000, correct? [LB260]

SENATOR LATHROP: That's true. [LB260]

SENATOR HARMS: Is that \$500,000 going to be taxable? Is that a direct (inaudible)... [LB260]

SENATOR LATHROP: That is up to the IRS. Currently the IRS does not tax personal injury settlements or verdicts. [LB260]

SENATOR HARMS: Okay. The other question I have is and I guess I'm still concerned about if we're going to give the individual \$500,000, is that a lump sum that that person is going to receive or is that spread out in any form or manner that we're going to give them the \$500,000? [LB260]

SENATOR LATHROP: It is a lump sum unless they elect to have it structured. [LB260]

SENATOR HARMS: Okay. The question and I guess the concern that I still have...I like everything you've done. Thank you very much for the work you've done. You've taken a lot of the concerns that I have away. I still have the concern about giving someone \$500,000 and not at least having someone who's an expert in investment and financing help that individual understand what their options are and how they can protect the \$500,000 and how they might be able to at least invest it safely so that it's not just blown immediately. A lot of people have difficulty handling it and I still am concerned about that. Is there any options here or do you think it's worth the discussion? [LB260]

SENATOR LATHROP: You've gotten to a fundamental problem that exists in any tort claim, and that is what do you do when it's a large sum of money? I represent people that go through those, and if it is a significant amount of money, I will...everything that's six figures or greater, but even sometimes less than that I'll persuade them as best I can to structure the money. That is you buy an annuity and it pays you over life instead of giving the person a big lump sum of money. But, Senator Harms, I appreciate your concern for these folks, I really do. But it happens everyday. It happens everyday and to begin requiring that we structure money is an area that I don't think we can legislate in because we can't imagine all the concerns that somebody might have. We could have a guy get this money and need a kidney transplant. And so if his money is structured, it isn't available and now the state is paying for a kidney transplant. So we can't anticipate everybody's needs and the law historically has said that money comes to you in a lump sum unless you elect to structure it. [LB260]

SENATOR CARLSON: One minute. [LB260]

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SENATOR HARMS: I guess, Senator, I guess I'm not thinking about structuring, I'm just thinking about giving them information that would help them at least know what their options might be. I guess I'm assuming that might be structuring. [LB260]

SENATOR LATHROP: I would say that...I don't know if I would call it the standard of care for lawyers that do this kind of work, but I think Senator White and Lautenbaugh who have been involved in handling tort cases as I have would tell you that most lawyers whose clients receive a six figure result are going to be schooled on structured settlements because it just makes sense and it's the socially responsible thing to do. [LB260]

SENATOR HARMS: Well, thank you very much. I appreciate the information. And also thank you for the work you've done. I think this makes it...clears it up, and I'm through now, Mr. President. Thank you. [LB260]

SENATOR CARLSON: Thank you, Senators Harms and Lathrop. Senators still wishing to speak: Schilz, Fischer, Hadley, Wallman, and Haar. Senator Schilz, you are recognized. [LB260]

SENATOR SCHILZ: Thank you, Mr. President and members of the body. I stand here today in support of the amendment. It seems to me that most all of the questions that I had on how do we keep this in line and keep it in check have been answered here. And as I look at the bill today, we've come a long way from where we were when it was introduced. And I guess if Senator Lathrop would yield to a question I'd like to ask him just one question. [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Sure. [LB260]

SENATOR SCHILZ: Thank you, Mr. President. Senator Lathrop, in the original bill and I was just looking through it again to see if I could find it, have we taken out the medical expenses going forward? Is that... [LB260]

SENATOR LATHROP: I will tell you that when we go to...that was part of the itemized list. So the lost of freedom in the original bill was \$25,000, \$50,000, and then we said medical expenses and lost wages and all those things. What we've gone to is those damages approximately resulting from your wrongful incarceration. And the judge will...if you, let's say that you...I'm trying to think of something where you'd need medical care after that, but if you needed...and you probably would need psychiatric care or psychiatric counselling, that would be one of your elements of damages that proximately results from your wrongful incarceration. [LB260]

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SENATOR SCHILZ: But as I heard you...correct me if I'm wrong, and that would be up to that person to show beyond that they have that and to prove that before they can... [LB260]

SENATOR LATHROP: Absolutely. Just to kind of give you a preview, if you were in front of the district court on one of these you'd have to prove the elements by clear and convincing evidence. And then you'd have to establish by the standard in the bill, which is preponderance for the damages, each of the elements of damages. So the courts will not allow for speculation. They won't award damages on speculative evidence. You have to prove it with a reasonable degree of certainty. So if you're going to have future medical care, you got to have a doctor come in and say this happened to him because of his wrongful incarceration, this is the care he's going to need, and this is what it's going to cost. [LB260]

SENATOR SCHILZ: And that will all be done up front. I mean you'll know that when you. I mean, you'll know that when you walk out as to what will be paid for going forward, correct? [LB260]

SENATOR LATHROP: Yeah. Absolutely. The judge will have to listen to that evidence and say has the claimant established by a preponderance of the evidence that he's going to have some...that he suffered some injury and they he'll require some medical care, and what's that going to be? The judge has to have some evidence from the claimant on what the cost of future care is going to be, otherwise the typical answer is you haven't met your burden of proof. [LB260]

SENATOR SCHILZ: Gotcha. Thank you very much, Senator Lathrop. And I would yield my time to Senator Louden, if he so wishes. [LB260]

SENATOR CARLSON: Thank you, Senator Schilz and Lathrop. And, Senator Louden, you have a minute and 55 seconds. [LB260]

SENATOR LOUDEN: Oh, why thank you, Senator Schilz. A question I have from Senator Lathrop if he'd yield for questions. [LB260]

SENATOR CARLSON: Senator Lathrop? [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR LOUDEN: Is there anything in here that says how many years they have before they can file or until they can file or is there statutes on limitations on how many years that they can't file? [LB260]

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SENATOR LATHROP: Yes, sir. And I'll tell you how that's done. This bill and the amendment actually puts this into the State Tort Claims Act. The State Tort Claims Act has limitations. And what the bill says is that once your sentence has been vacated or you've been pardoned, your cause of action accrues. That's the date where we start counting the clock. The State Tort Claims Act says you have two years to give notice of your claim and two years to file your lawsuit against the state of Nebraska. So by running this through... [LB260]

SENATOR CARLSON: One minute. [LB260]

SENATOR LATHROP: ...or incorporating the State Tort Claims Act, we have placed this into an existing system with time limitations. [LB260]

SENATOR LOUDEN: Okay. Thank you, Senator Lathrop. One other question that I was kind of concerned about. If someone serves their time and then several years later they get a pardon, is there any way that they could file a claim for something like that? [LB260]

SENATOR LATHROP: Did you just ask if they were fined rather than if they were incarcerated? [LB260]

SENATOR LOUDEN: Well, if they were incarcerated for sometimes 18 months or something like that, and then as time goes on, maybe they want to run for city council of Lincoln or something like that and they want that pardoned. Could they then file a claim for that if they got pardoned? [LB260]

SENATOR LATHROP: First of all, the time limit to make that claim would be two years from the date of their pardon. It would have had to have been a felony, they would have had to have done prison time. Okay. [LB260]

SENATOR CARLSON: Time. Thank you, Senators Louden and Lathrop. Senator Fischer, you are recognized to speak. [LB260]

SENATOR FISCHER: Thank you, Mr. President and members of the body. First of all, I would like to thank Senator Rogert and Senator Lathrop for working on this bill, and especially on this amendment. I had many concerns with the bill at the beginning and I believe they've all been answered. I would like to ask Senator Lathrop a question if he would yield at this time. [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes. [LB260]

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SENATOR FISCHER: Senator Lathrop, we had discussed if someone takes the settlement, takes the \$500,000, can they come back later and sue the state? And we had talked off the mike about Section 9 of the bill. Could you explain that, please, for the body? [LB260]

SENATOR LATHROP: I'd be happy to. And what I will tell you is I would not expect many of these to be \$500,000 claims. That's just the most it can ever be. They may settle one for \$20,000 or something like that. But once they make a recovery, Section 9 very clearly and unequivocally says that you cannot make a claim against the state of Nebraska under any other theory of recovery, and that would include in state court or in federal court. [LB260]

SENATOR FISCHER: I believe also in the bill, say the person may pass on, can their survivors in any way sue the state for any payments of any kind? [LB260]

SENATOR LATHROP: No, and that was the concern that Senator McCoy expressed last time we were on General File. And in Section 4, paragraph 5 we say the cause of action does not survive the claimant's death, so nor can the claimant assign it to somebody else. But if the person who is wrongfully incarcerated dies, then the claim dies with them. [LB260]

SENATOR FISCHER: Okay. Thank you, Senator Lathrop. Again, I do support this bill now with the amendment, and I appreciate the work that's been done on it. Thank you very much. [LB260]

SPEAKER FLOOD PRESIDING []

SPEAKER FLOOD: Thank you, Senator Fischer. (Visitors introduced.) While the Legislature is in session and capable of transacting business, I propose to sign and do hereby sign LR50. Continuing on with discussion. One note, we will be taking up a motion from Senator Langemeier to cancel a public hearing at the conclusion of the next speaker's opportunity to speak. With that, continuing on with discussion on AM785. Senator Hadley, you are recognized. [LB260 LR50]

SENATOR HADLEY: Thank you, Mr. President, members of the body. Would Senator Lathrop yield to a question? [LB260]

SPEAKER FLOOD: Senator Lathrop, will you yield to question from Senator Hadley? [LB260]

SENATOR LATHROP: Yes I will. [LB260]

SENATOR HADLEY: Senator Lathrop, it seems to me one of the biggest changes is

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we've gone from just a set sum for the damages to basically the person who's been pardoned or let free having to prove damages. Do you think that that puts the person who is in this circumstances at a disadvantage in receiving monetary awards? [LB260]

SENATOR LATHROP: I think the bill as originally drafted was more generous than the amendment. The fact that we are going to make the claimant establish his damages proximately resulting from the wrongful conviction is consistent with the way tort claims are handled against the state and against anybody who's wronged another person. So I don't think it's...to the extent we place the burden of proof, which the law historically does, on the person making a claim, it puts them at a disadvantage, but I think it's consistent with tort principles in the law as it relates to making claims for damages. [LB260]

SENATOR HADLEY: Senator Lathrop, assuming this person finds himself in this circumstance, obviously it will mean going to court again. Are there...I would guess a number of these people would be indigent, would they be able to get legal counsel to help them in these types of claims or is this a moot point at this point in time? [LB260]

SENATOR LATHROP: That's a great question, and you'll see that one of the other things we did is took out attorney fees because that's historically not permitted in tort claims against the state. A person who would have a claim like this would go and call a lawyer that handles claims against the state. And typically an attorney would listen to the circumstances and if there is merit to it, the lawyer would say I'll represent you on a contingent fee, which means that they'll do it on some percentage of the recovery. So if somebody has a meritorious claim, they won't have any trouble finding a lawyer to help them. If there claim is not meritorious, they will have trouble finding them and we don't want to provide lawyers for people who don't have meritorious claims. [LB260]

SENATOR HADLEY: Thank you, Senator Lathrop. I appreciate your answers and I do have just a little problem with the difference between a set sum and the person having to prove damages. But the one thing, the last thing I'd like to bring up is that we're basically dealing with cases with DNA evidence finding someone that didn't do the crime. And I just want to bring up again that in 130 exonerations, 101 of them were because of mistaken identification. And I am concerned about, you know, I'm not soft on crime, but I just I worry about the people where there are no DNA evidence there from our whole criminal system and they end up in jail. If you happened to watch 60 Minutes the other night there was a great half an hour segment on misidentification in criminal trials. And it's more common than you would think. So I just hope that we help our court system because we want to convict the guilty and we want the innocent to go free. Thank you, Senator Lathrop. Thank you, Mr. President. [LB260]

SPEAKER FLOOD: Thank you, Senator Hadley. (Visitors introduced.) Mr. Clerk for a motion. [LB260]

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CLERK: Mr. President, with respect to LB561, Senator Langemeier would move to suspend Rule 3 Section 14 to prevent cancellation of public hearing scheduled for this Thursday, March 26 by the Natural Resources Committee. [LB561]

SPEAKER FLOOD: Senator Langemeier, you are recognized to open on your motion. [LB561]

SENATOR LANGEMEIER: Mr. President, members of the body, LB561 in committee was faced with a second amendment that was offered to it as a committee amendment. In my judgment as committee chair we deemed that amendment needed its own public hearing. We scheduled the public hearing, we put notification out, and then when we redrafted the amendment to match up more in line with LB561 the amendment number changed. There is a lot of confusion within the people outside of the Chamber to what amendment we are having the hearing on. And so with that, I would ask that you would vote to suspend the rules so we can cancel that hearing, and then I can reset a hearing date for the new amendment and the proper number so we can alleviate all confusion to what we're doing. So I would ask that you vote to suspend the rules so we can cancel that hearing so we can regive another seven day-notice on the final AM number so everybody is duly notified and very clear to what the hearing is. And with that, I'd ask for you support. Thank you. [LB561]

SPEAKER FLOOD: Thank you, Senator Langemeier. Members, you've heard the open. There were several lights on before as we were discussing LB260. Senators Wallman, Haar, Loudon, and Nelson, please turn your lights off if you do not wish to be heard on this specific amendment. Seeing no lights on, Senator Langemeier, you recognized to close. [LB561]

SENATOR LANGEMEIER: Mr. President, thank you. I would ask that the body vote to suspend the rules so we can cancel the hearing so we can reschedule it and make sure we take care of all inclarities that might be out there. Thank you. [LB561]

SPEAKER FLOOD: Thank you, Senator Langemeier. Members, you've heard the motion. The question is, shall the Legislature suspend the rules to permit the cancellation of said hearing? All those in favor vote aye; all those opposed vote nay. Mr. Clerk, please record. [LB561]

CLERK: 35 ayes, 0 nays, Mr. President, on the rule suspension. [LB561]

SPEAKER FLOOD: The motion is successful. [LB561]

CLERK: Mr. President, as a result of that action, I have a hearing notice cancellation from Senator Langemeier for this Friday, and I also have a subsequent notice of hearing

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for AM769 for Friday, April 3. Reports, Mr. President. Judiciary, LB122 to General File, and LB517 to General File with amendments, those reports signed by Senator Ashford. Senator Stuthman, three amendments to LB355 to be printed. Senator Langemeier, an amendment to LB483 to be printed. Reference report referring a certain gubernatorial appointee to standing committee for confirmation hearing. Name adds: Senator Fulton would like to add his name to LB457; Senator Campbell to LB555. (Legislative Journal pages 825-826.) [LB122 LB355 LB457 LB483 LB517 LB555 LB561]

And a priority motion. Senator Council would move to adjourn the body until Wednesday morning, March 25 at 9:00 a.m. []

SPEAKER FLOOD: Thank you, Mr. Clerk. Members, you've heard the motion. All those in favor say aye. Those opposed say nay. The ayes have it; we are adjourned. (Gavel)
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