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Judiciary Committee
February 24, 2010

[LB765 LB988 LB990 LB1075 LB1105]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 24, 2010, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB1075, LB765, LB1105, LB988, and LB990. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Mark Christensen; Colby Coash; Brenda Council; Amanda McGill; and Kent Rogert. Senators absent: Scott Lautenbaugh.

SENATOR ASHFORD: Good afternoon, everyone. How is everyone doing? Welcome to the Judiciary Committee. Today we have five bills, starting out with LB1075. And I'll tell you what we're going to do on LB1075. Senator Carlson will be introducing LB1075, and he has requested, and I think it's a reasonable request, that Tom Osborne be allowed to testify with Senator Carlson as a cointroducer-type person. So I think that's just fine. We're going to have the hearing on LB1075 last till 3:00. It will end at 3:00. I will keep the sides equal but...and if there's some time at the end maybe we'll have some more testifiers, but 3:00 is going to be the end of LB1075 because we have four other bills. I'd like to introduce my colleagues, and then we'll turn this over to Senator Carlson and to Coach Osborne. But, first of all, Steve Lathrop from Ralston; Amanda McGill is here from Lincoln; and, of course, Brenda Council from Omaha. My colleagues to my left--or not necessarily to the left, but they're to my left--and they are...two of them will not be here today but I know Senator Christensen is coming later...Coash. Senator Christensen is gone, is that right? I'm sorry. LaMont is, to my right, is my legal counsel. And Christina is the committee clerk, and I see Jamie and Sarah are the pages. So with that, I'd asked Senator Carlson and then Tom Osborne after that, and then we'll go on to the testifiers in favor of LB1075. Senator Carlson, welcome.

SENATOR CARLSON: Thank you, Senator Ashford and members of the Judiciary Committee. I am Tom Carlson, spelled C-a-r-l-s-o-n, representing the 38th District, here to introduce LB1075. It's my pleasure to introduce this bill for Michelle and Anna Jo Cowan, who, along with others, follow me with their testimony concerning dram shop laws. LB1075 adopts the Alcoholic Liquor Liability Act. The purposes of the act are to prevent intoxication-related injuries, deaths, and other damages, meant to establish a legal basis for obtaining compensation for persons suffering damages as a result of service of alcohol under certain circumstances. Specifically, the bill creates a cause of action in addition to those available in tort law against a bartender or licensee who serves liquor by the drink to an intoxicated person when the server knew or should have known that the customer was intoxicated or knew or should have known that the person would become intoxicated. Long-term members of this committee have heard this bill or similar pieces of it the past few years, and Senator Kruse was an advocate for liquor liability legislation and he will also address you today. Forty-two states currently have some type of dram shop legislation on their books. Dram shop laws do not decrease personal responsibility. Creating a cause of action against an overserving establishment

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does not mean that the individual is not also held responsible. Rather, punitive damages for both drinking drivers and serving establishments serve similar purposes: to show them the penalties that come with their actions and to cause them to rethink their practices. Studies show that states that have a high level of dram shop liability have more publicity about the impacts of liability and have more servers and managers who are aware of liability. Nebraska's present law states that adults not buy, procure, give, or sell beverage alcohol to those less than 21 years of age. If a minor causes an accident or damage, the adult who provided the alcohol has civil liability for damages and can be sued by the injured party. Liquor licensees have no such liability under present law, as the regulations pertaining to them apply to serving adults over 21. The Nebraska Liquor Control Commission has several server training courses available on-line but has no requirements for training. Now some of the arguments in opposition will dwell on personal responsibility of the one who consumes alcohol. And I've tried to think of a couple of different examples to give that I think help paint the picture here. When any of you go shopping to purchase something, as a buyer you have a responsibility to learn about what you're buying. The person who sells to you has a personal responsibility to be honest, to tell the truth, and not make misleading or false statements. Second example: When any of us decide whether or not to obey or break a law, as an individual we have personal responsibility to obey the law of the land. If we break the law, we accept the consequences. Now law enforcement has a personal responsibility to enforce the law, to apprehend those who break the law, and do it in a manner that's just and fair. To falsely accuse to convict, they may suffer the consequences. Another example: Brad and I might have a vehicle accident, and I enter the intersection first and he broadsides me. Now, under law,... [LB1075]

SENATOR ASHFORD: Never happened. [LB1075]

SENATOR CARLSON: ...under present law, neither one of us is 100 percent liable. We both share some liability even though I think it's his fault. And both have personal responsibility, whether it's fair or unfair. And, of course, our fourth example: selling liquor by the drink to an intoxicated person or an obviously...a person headed toward being intoxicated and allowing them to continue to buy and continuing to serve them. There is a responsibility on the part of the buyer, but the server at this stage is showing lack of responsibility and probably gross negligence. My interest in the dram shop bill for Nebraska came about with input from three sources: number one, Tom Osborne; number two, Michelle and Anna Jo Cowan; but, third, my feelings whenever I see an article where someone was killed in an accident where a drunk driver was involved. It is especially frustrating when the intoxicated driver had several prior DUIs. I think to myself: What is wrong with our system? Could this tragedy have been avoided or prevented? This concludes my introduction. I'm going to ask the committee to allow Tom Osborne to follow me with his testimony and then Michelle and Anna Jo Cowan. Thank you for your attention. I'll attempt to answer any questions you might have. [LB1075]

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SENATOR ASHFORD: Any questions of Tom? Senator Council. [LB1075]

SENATOR COUNCIL: Yes, thank you, Chairman Ashford. Thank you, Senator Carlson, for the opening. In looking at the bill, and particularly the statement of intent, the one question I have and is a concern is that it imposes liability on a server "who should have known that the person would become intoxicated." What is the standard for someone being able to know that a person would become intoxicated? [LB1075]

SENATOR CARLSON: That's a fair question. I don't have the exact answer. And certainly you and I both know that's part of the purpose of a hearing, to hear these things out. But it's fair to say that's something that should be pretty clearly defined. I don't have an exact answer. [LB1075]

SENATOR COUNCIL: Thank you, Senator Carlson. [LB1075]

SENATOR ASHFORD: Thanks, Tom. [LB1075]

SENATOR CARLSON: Okay. [LB1075]

SENATOR ASHFORD: Coach Tom. [LB1075]

TOM OSBORNE: (Exhibit 1) Well, thank you, Mr. Chairman. It's a pleasure to be here. I'm here to testify in favor of LB1075, known as the Alcoholic Liquor Liability Act. I am here representing myself and do not speak for any other organization, including my employer which is the University of Nebraska. I've chosen to testify today because I was approached several months ago by Anna Jo Cowan and her mother Michelle. Anna Jo's father, Michelle's husband, had been killed by a drunken driver in a head-on crash. They lost a father, a husband, and the chief family provider. Anna Jo wanted her father's death to result in something positive that might prevent similar tragedies from occurring in the future. Therefore, she asked for my assistance in finding a state senator who would introduce the dram shop bill. We're very fortunate to have had Senator Carlson introduce the bill and want to thank him for doing so. We also want to thank Senator Harms and Senator Howard for their support, and, of course, Senator Lowen Kruse. The woman who killed Mr. Cowan had been drinking for an extended period of time in a bar. Left the bar intoxicated and killed Mr. Cowan in a head-on crash. Had the crash occurred in Iowa, Michelle and Anna Jo could have recovered damages from the bar, as Iowa has a dram shop law. Nebraska doesn't. And since most people who drive drunk have very few financial resources, often the victims are left with a great deal of expense and no monetary recompense. The bill holds drinking establishments liable for serving a patron to the point of intoxication who then later injures or kills someone. The bill requires drinking establishments to carry liability insurance to cover incidents experienced by the Cowans. The bill will save Nebraska taxpayers from having to

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assume payment for many individuals who are permanently disabled or who have extended periods of hospitalization and treatment due to the actions of drunk drivers. The recent motorcycle helmet law debate recognized the concern about taxpayer liability for catastrophic injuries. Forty-two states have dram shop laws. Nebraska is one of only eight that doesn't. Dram shop laws have shown--and these are things I'd really like to emphasize--nearly a 6 percent decrease in fatal crashes in those states initiating such laws; (2) a greater awareness of overserving by bartenders; (3) a decrease in low price drink promotions such as two-for-one drinks; (4) more thorough ID checks; and (5), a reduction of drinks per sitting of 1.6 drinks on average. I'd like to emphasize that 1.6 drinks per person on average reduction which I think is very significant. You will undoubtedly hear about the importance of personal responsibility from opponents of the bill. However, an alcohol dependent person often does not have the ability to exercise good judgment and does not know when it is time to quit drinking. As one drinks a larger amount of alcohol, the ability to exercise personal responsibility in regard to driving a motor vehicle becomes severely impaired. The drinking establishment has a responsibility to employ personnel who are trained in identifying alcohol impairment and have the good judgment to not turn an inebriated person loose on the public behind the wheel of a motor vehicle. The drinking establishment should be required to purchase liability insurance for negligent practices, as nearly all other businesses do. This is a good bill. Mr. Cowan was an employee of the state of Nebraska but lived in Council Bluffs. Had his accident occurred in Iowa, Michelle and Anna Jo could have benefitted from Iowa's dram shop laws, which would have allowed them to hold the bar serving the offending party liable. Since the accident occurred in Nebraska, the Cowans were left without significant legal recourse which could have led to greater financial security on their part. The net result of passing this bill will be fewer alcohol-related deaths and injuries, less drinking to the point of intoxication, less public expense to care for victims of drunk drivers, and better financial resources for victims of drunk drivers. I urge its passage. I've also enclosed, with that, the testimony, the listing of states who have dram shop laws and those that don't. You'll notice that there are eight, Nebraska being one who doesn't. And then also a listing of substantiating research which indicates some of the facts that I've tried to present in this testimony. So with that, that will end my testimony. If anyone has a question, I'll be glad to try to answer it. [LB1075]

SENATOR ASHFORD: Any questions of Tom? Thanks, Tom. [LB1075]

TOM OSBORNE: Okay. Thank you. [LB1075]

SENATOR ASHFORD: Thanks for all your work on this issue. [LB1075]

TOM OSBORNE: You bet. [LB1075]

MICHELLE COWAN: (Exhibit 2) My name is Michelle Cowan, C-o-w-a-n. I am a widow and a mother trying to save another family from the grief and tragedy of the loss of a

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loved one due to drunk driving caused by overserving alcohol. I come before you without the help of a large industry and its partners who can afford strong lobbyists to be a voice for their interests. My voice is for my late husband, Joe Cowan, who was murdered by a woman who had spent the day drinking to the point of intoxication. It was later reported on WOWT that she spent the day drinking at an Omaha licensed liquor establishment. Joe was crushed to death on a Nebraska roadway on March 30, 2009, by a drunk driver by the name of Linda Therien. She had a BAC of 1.46, almost twice the legal limit. I would like to reference the Nebraska State Patrol accident report, and I quote, "On April 2, 2009, Trooper Black interviewed Jenn Gautie, a bartender at Cabin Inn. Jenn stated Therien frequented the Cabin Inn and would be there approximately 7-8 p.m. Jenn stated she also frequented Kozee Lounge around mid-afternoon. Jenn stated Therien was at Kozee Lounge on March 30, 2009, that afternoon. She had given the individual by the name of Woody a ride home just prior to the accident." End of quote. Senators, you have the power to change this and allow innocent victims and their families the right to hold negligent behaviors of bar owners civilly accountable for their role in a death or an injury, but most importantly, you have the power to make a difference in saving lives of the residents and visitors to your state. Our emotional loss has been difficult. I lost my husband that I had been with for almost 19 years. Can you imagine the last kiss you will ever give your spouse is on his cold lips? Or the touch of his skin being hard and cold? Can you imagine having all your dreams with your spouse shattered? The biggest loss is for my daughter who, at 15 years old, lost her father. Our sense of safety has been stripped from us. My daughter's innocence has been destroyed. Can you imagine how I felt when the state patrolman told me that my husband was dead and I looked over at my daughter as she fell to the floor sobbing and crying out for her dad? Can you imagine how I felt letting her pull out of the driveway for the first time by herself when she turned 16 and got her driver's license, especially because her dad, a seasoned driver, could not even drive home from Fremont without getting killed? Joe's 81-year-old widowed mother has lost one of her two sons and the support he gave his elderly mother. His brother has lost his only sibling. The crash destroyed our lives and forced us to find a life without our loved one. We are victims of that crash that took Joe. On top of the great emotional loss, we have suffered financially as well. We lost Joe's income; our health insurance, because he carried it and I could not afford to pay the high COBRA cost. We had unexpected funeral costs, and our family vehicle was destroyed. We lost Joe's retirement potential, and now I have to hire help to maintain the house, the yard, and the cars that Joe used to do. My family is paying the price of others' deadly decisions. By not having this law, who is benefitting from it? Who is controlling the well-being and safety of innocent victims on Nebraska roadways? Is the alcohol industry and its partners? I find it interesting that when I did a quick search of the Nebraska Accountability and Disclosure Commission, I noted that an elected official of the state of Nebraska accepted at least \$30,000 in campaign contributions from two businesses in the alcohol industry--and this was just one page, one individual, for one year. I wonder how many times...how many others in elected positions have accepted monies from the alcohol industry? I wonder how these sorts of

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contributions to campaigns play a role in whether or not bills are passed? It seems to me that when a bill could be passed to save an innocent life, it should be a no-brainer. But in Nebraska this is not the case. This bill has been before the Legislature in past years, and yet it has never been passed. And why is that? How many deaths have to occur before the people in the lawmaking power understand they can do something to prevent these innocent lives being lost? Personal responsibility does start with the drunk driver, but there is also responsibility of the bar owner who should not allow overserving of a patron who's intoxicated. According to Dr. Robert Arias, a clinical psychologist and neuropsychologist, alcohol produces depressive effects on various areas of the brain, causing impairments in normal social functioning, loss of memory, confusion, disorientation, movement not coordinated, and progressive lethargy. There is something wrong when a sober bartender continues to serve someone intoxicated and is not held accountable for this when an innocent victim is injured or killed. The bar owners say that the law could cause them financial loss if they are sued. They are not the real victims. The innocent who die and are injured are the real victims. The bar owners would not be sued if they would just serve responsibly. Another consideration that I would like to point out is that my husband was a state of Nebraska employee. Now if he would have lived and had catastrophic medical costs, the state of Nebraska would have been paying for his medical care and his disability, so the state would have assumed the responsibility for that accident in one way or another. This is just one example of the ripple effects of this preventable crime. Senators, please have a social conscience and do the right thing. Approve LB1075. If this can happen to us and we don't even live in this state, it can happen to you if it happened to your spouse, your child, or your parent. Thank you for your consideration. [LB1075]

SENATOR ASHFORD: Any questions of Michelle? Thank you, Michelle. And I do admire your efforts in this matter. [LB1075]

MICHELLE COWAN: Thank you. [LB1075]

SENATOR ASHFORD: Anna Jo, are you next? [LB1075]

ANNA JO COWAN: (Exhibit 3) My name is Anna Jo Cowan, C-o-w-a-n, and my father was killed by a drunk driver. The early evening hours of March 30, last year, the day he was killed, he purchased a vehicle for my mother. He wanted her to be safer on the roads because she did not have four-wheel drive, as she drives for her job a lot so he wanted her to be safe. And he got her a four-wheel drive vehicle that day. The car salesman offered to drive the car to our house and my dad followed him. He was taking the car salesman back to the dealership, and on his way home from that he was hit head-on and killed instantly. My mom had a feeling that something was wrong when my dad was not answering his phone and he should have been home by 7:30 that night. We had just talked to him at 6:30. Can you imagine the horror that I watched...as I watched my mom pace around, calling and calling many people, and getting no

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answer? Can you imagine what it was like watching her open the door to two Iowa state patrolmen and telling her that her husband was killed? The horror that took place in my home that night will forever be implanted in my brain. By the absence of the dram shop law, the message is that the bar owners and alcohol servers do not have to take responsibility when they overserve a patron to the point of intoxication. As a direct result of the liquor establishments' negligent actions, death and injuries have occurred. By the passage of this law, it will make liquor licensed establishments more responsible and think twice about continuing to serve intoxicated patrons who then might attempt to drive upon leaving the establishment. I no longer have my father to guide me, help me, and protect me in my life decisions. My dad was a good dad and did not deserve to die in such a senseless way. One thing he taught me was to always give my full effort and do the right thing in life. Repeating our story has been difficult, but I don't want to see another kid lose their loved one like I did, so I'm giving my full effort to make a difference in saving their lives. Senators, can you say the same thing about yourselves? We will never know for sure, but if Nebraska lawmakers had voted in a full dram shop when former Senator Kruse introduced it a couple years ago, my dad might be still alive today. If 42 other states have dram shop, why can't Nebraska? Why does my family and other victims have to suffer the consequences of deadly decisions that others make regarding alcohol and driving? These alcohol-related accidents have ripple effects in the community. What about the insurance industries that insure the victims? There might be life insurance, vehicle repair or replacement, property damage, and endless medical costs. These accidents affect employers of the victims also. What about the medical costs for those victims who do not have health insurance? Will Nebraska residents' tax dollars pay for the cost of medical care? Why should other Nebraska businesses and residents of the state suffer financially so that the liquor industry is protected? It is time, Senators, to do the right thing. Set an example for the residents and visitors of your state that you will not tolerate abuse by the alcohol industries when they break the rules and regulations of the Nebraska Liquor Control Act. Do you allow other licensed businesses in Nebraska to be free from civil liability if they injure or kill someone by not following the rules of the license they are granted? It is a privilege. By not passing this law, the victims are being victimized again by the lawmakers allowing the drunk drivers and the careless servers of the alcohol in the licensed establishments. That is the message that you will be sending to the public if you do not pass this important bill. With the passage of this bill, the goal is to make the bar owners and servers think twice about serving someone to the point of intoxication. It will hold them accountable to follow the rules and regulations of the Nebraska Liquor Commission that is already in place. But, most importantly, it will save lives. Don't you want your state to be as safe as it can for your own family? Thanks to careless and negligent bartenders who overserve the patrons, my father was stolen from me, and my mother lost her husband, a husband who was only trying to do something special for his wife--my mom--on the day he was killed. It is ironic that he was worried about her safety on the roadways and he was killed in the process of trying to protect her. Thank you. Are there any questions?

[LB1075]

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SENATOR ASHFORD: Thank you, Anna Jo. Any questions of...thank you. [LB1075]

ANNA JO COWAN: Thanks. [LB1075]

SENATOR ASHFORD: And thank you for all you're doing. Why don't we go to Senator Kruse, first, if we could? And then...Lowen, five minutes, and then we're going to go to the lights after that. [LB1075]

LOWEN KRUSE: Hello to all. I am Lowen Kruse, K-r-u-s-e, 5404 North 50th Avenue, in Omaha. Others are speaking to the merits and reasons for the bill. I think my time is best used by going through the history of the bill. Five years ago, that we, several of us, brought the first bill to be dealt with, and it is to remove the exemption, I think it's the simplest way to put it, to remove the exemption of these businesses on violation of particular laws and regulations--the only business that I've been ever able to find that has an exemption to liability when they cause a violation. Fairly soon, within that, the businesses said that they would prefer training for the servers. Well, I prefer that too, and that's what it's really about. We're trying to motivate the servers to do the right thing. They're the ones standing between us and mayhem. So we changed that, and the commission said it would take a year or two to get going on the certification. And so then, three years ago, after that time was up, we went with the certification. It was...the commission said they weren't able to handle that many people. So we backed up to the original exemption and removed the exemption for minors. I'd remind the senators that, and everybody present, that we do have a dram shop law in Nebraska, and it went in without much fuss and went in without a ripple. And the insurance and all those different kinds of things that were considered such a threat, did not happen. So we're back now to the question of it being there for adults. I thank those who are bringing it. I have no doubt, as has been referred to by the Cowans, that if we had done this earlier, that Joe would still be alive, because it would have changed the sequences to have somebody think twice. And the server indicated that she did not think twice about this. The only flaw I see within the bill is that it does not apply to convenience stores. And the flaw I feel there is because our son is paralyzed because of the contribution of a convenience store with three violations that caused the impairment to our son. The police officers present, and later, told us there's no point in pursuing that because the commission won't do anything about it. You've got enough grief on your hands. You've got a son in the rehab hospital and pay attention to that and let the rest of it go. Well, that's a motivation. That's kind of the sanction power that should be at work--but it's not at work, and there's a variety of reasons for that. I'm not slamming anybody, but this is the motivation that I'm sure will work. Bartenders have told me that they're not highly motivated to follow the regulations of a license, because the more intoxicated the customer gets, the bigger the tips. And one of them said: The tips will go from \$1 to \$5, and I like that. Well, the owners don't get tips. And so what we've got to come up with to protect ourselves is a strategy by which the owner is motivated to ride herd on that

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bartender to do the right thing, and the right thing is to monitor the drinking that's going on. And, by the way, Senator Council, in the original bill and within the regulations, it is...it's not a predictive thing on the part of the bartender. It is something that can be admissible into a civil court, that bystanders will see, that the person is obviously drunk. I commend the bill to you, and I think we've come a long ways on it. It is helpful to recognize that here's a way that we can motivate persons. Most businesses do the right thing. It's the way to motivate, as always with the law, those that are not inclined to do the right thing. Thank you. [LB1075]

SENATOR ASHFORD: Thank you. And yeah, just briefly, and I...your work on the other bill was important and it is a dram shop law. And I think the point...and I think also LaMont Rainey, our counsel, worked on that bill, as did Senator Lathrop, and it was a good first step. And my sense is that it has not escalated insurance costs through the roof, but maybe we'll hear more about that, but certainly... [LB1075]

LOWEN KRUSE: I have inquired and not been able to find any. [LB1075]

SENATOR ASHFORD: But thank you for your, needless to say, incredible amount of work on these issues. Thanks. Senator Council. [LB1075]

SENATOR COUNCIL: Yes, thank you, Senator Ashford. And thank you. You will continue to hold the title of Senator Kruse, for your comments. And getting to the point of my question to Senator Carlson: Reading the green copy of LB1075, it does specifically state "when the licensee knew or should have known that the person would become intoxicated," and it goes beyond just saying they should have known...knew or should have known that the person was actually intoxicated. It imposes a responsibility to somehow predict whether or not an individual become intoxicated, and...I mean, in applying that standard, then you couldn't serve anyone. [LB1075]

LOWEN KRUSE: I would agree with you, and I see that language as unnecessary to the intent of the bill. Persons aren't going to be...there are not going to be many cases from this. What you want is to motivate somebody. And in terms of, as we were dealing at the time with your present legal counsel, we were recognizing that the civil court isn't going to be able to do it with "what if" scenarios. It has to be that you have to bring in witnesses that say we saw the guy, and--if it was a guy--and he was obviously intoxicated. And the Liquor Control Commission has many identifying marks that do a good job of outlining that. [LB1075]

SENATOR COUNCIL: And, no, I don't disagree with you, Senator Kruse. And I guess as a point of disclosure for those in the room who are here on LB1075, I was a bar owner and operator myself for seven years, aware of the training requirement, and have no doubt that my servers, my waitresses and bartenders, were very conscious of their responsibility. But I can't tell you that I can tell when someone could become

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intoxicated. And I appreciate the fact that, you know, it would be a matter that would be ultimately a point of the facts were determined in litigation but to subject a responsible liquor establishment owner to having to defend the case that was based upon the statute. And that's what...you know, when the complaint is filed, the complaint will say: This action is being filed because Establishment X violated Nebraska Revised Statute Section (inaudible), Section 4, by serving alcohol to someone they knew or should have known would become intoxicated. And I just...I have real problems--I mean real problems--with that aspect of this bill. [LB1075]

LOWEN KRUSE: Well, I agree with you. This is typical legal language for some other situations, as you're well aware, but it's absolutely unnecessary to this, and we have...and in the bills that we were carrying before, it was not there. So I don't...there's not a deficit if you take it out. [LB1075]

SENATOR COUNCIL: Thank you. [LB1075]

SENATOR ASHFORD: And I think the facts of the Cowan case, as they've been explained to me, is that the individual involved in the accident with Mr. Cowan had been in a bar or tavern for a significant length of time, and was observed in that state. So I think that, under...Senator Council makes a great point, and certainly that would not be necessary to prove liability on a normal dram shop law that they...right? [LB1075]

LOWEN KRUSE: I would agree. And, in fact, it would, to me, weaken the case when you're trying to come to court and make a clear-cut thing. I don't know how you make that clear-cut, so. [LB1075]

SENATOR ASHFORD: Right, right. I don't think you could ever...I don't know if you...maybe it was a...it must have been a typo, Senator, so. [LB1075]

LOWEN KRUSE: Yeah, it must be. But it wasn't my typo, Senator. (Laugh) [LB1075]

SENATOR ASHFORD: No, not your typo. You're off the hook there, Senator Kruse. [LB1075]

LOWEN KRUSE: I would just note that this is a very expensive thing. Our son's bills are \$4 million to \$5 million, and they're being paid by taxpayers. [LB1075]

SENATOR ASHFORD: And we hear so many cases in this committee about families who have been severely injured, and there's no way that...and not have...and they do not...for whatever reason there's no coverage, and the state pays exorbitant fees. So it's a big issue that we need to address head-on. [LB1075]

LOWEN KRUSE: It is a big issue--and it's the rest of his life. [LB1075]

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SENATOR ASHFORD: Right. I understand. [LB1075]

LOWEN KRUSE: Thank you. [LB1075]

SENATOR ASHFORD: Thank you very much, Senator Kruse. We're going to go to the next testifier. We will extend the time to 2:30, and then the opponents will have until 3:30, but that's going to be it. And we'll have to get the neutral testifiers in there, too, so. We're going to go to...what we have, for those who are not here on a normal basis...some of you are and some aren't, obviously. We ask you to confine your comments to three minutes. There will be an orange light that will come on when we...with about a minute or so to go. We'd ask you to sum up when that orange light comes on. Okay, thank you. Go ahead. [LB1075]

ED RAMSPOTT: (Exhibit 4) Chairman Ashford and members of the Judiciary Committee, my name is Ed Ramspott, that's R-a-m-s-p-o-t-t, and I'm from Blair, Nebraska. I'm speaking on behalf of LB1075. I've worked for 35 years at the University of Nebraska Medical Center, and am the assistant director for finance and administration at the Eppley Cancer Institute at the University of Nebraska Medical Center where Joe Cowan worked. I want to clarify that I'm not speaking on behalf of the Eppley Institute or of UNMC. Thank you, Senator Carlson, for introducing the dram shop law for the state of Nebraska. The effect of not having such a law has touched me both on a very personal and professional manner in the last several years. The far-reaching effects of both have changed my life forever. On a personal level, almost six years ago my youngest son, at the prime age of 27, was killed in an accident involving a third offense very drunk driver who did not stop at the accident scene, as he claimed he did not know he had hit a 180-pound young man on a bicycle. This happened in another state that also does not have a dram shop law. Unless you have had to experience the loss of a child, there really is no way for me to convey to you how this has changed my life. More recently, almost one year ago, my coworker, Mr. Joseph Cowan, was killed in a traffic accident in north Omaha, involving a drunk driver who crossed the center line and collided with Mr. Cowan, killing him instantly. The woman who hit him spent a significant amount of her day at an Omaha drinking establishment and had just come from the bar prior to the accident. Her blood alcohol content was almost twice the legal limit. Mr. Cowan had worked for me for almost 15 years and was a trusted, loyal, very bright, and dedicated employee. He supervised our accounting department. I received a call on the evening of his death, and I knew that my workplace would never be the same. First, I had to deal with my own personal shock of this event, and then I had to deal with the effects on his coworkers and other individuals who had depended on him for doing his job. It is extremely difficult in situations like this to keep the morale of the rest of the staff positive and to keep production going in a workplace. Obviously, the work must go on, but it adds new obstacles. Retraining of the current employees and the search for a replacement for Joe and training of that person had to take place

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immediately. All of this had to happen while I dealt with the personal loss of Joe as a friend and coworker. I have worked in the area of cancer research for a number of years and I've heard of and seen a lot of progress that has changed the health and life of thousands of people. Perhaps someday soon we will have a test that will not allow an individual to drive a car or operate a piece of equipment if an individual's blood alcohol content is above a certain level. Until that time, we need a dram shop law in Nebraska that can be enforced. I'm sure that something can be done to help prevent more individuals from suffering the results of these alcohol-related incidents. I thank you for allowing me the opportunity to testify on behalf of this bill, and if you have any questions I'd be glad to try to answer them. Thank you. [LB1075]

SENATOR ASHFORD: Thank you, Ed, for your testimony. Appreciate it. Next proponent. [LB1075]

JIM GREELIS: (Exhibit 5) Thank you, Senators, for allowing me to testify today. I'm Jim Greelis. I live and work in the Omaha area. I'm here to talk to you today a little bit about how businesses are impacted by the lack of a dram shop law in Nebraska. I am a citizen of the state of Nebraska, and I'm not here to testify on behalf of any one business that operates in this state. Bars need to be financially responsible when they serve individuals alcohol to the point or past the point of intoxication. We know that people that visit bars, drive vehicles, and when impaired by alcohol they are less aware of their surroundings, including paying attention to signage that is critical to the safe operation of their motor vehicles. In my job as an accident investigator for Union Pacific Railroad, I and my Nebraska coworkers have spent many nights and follow-up days investigating train/vehicle accidents that have involved alcohol-impaired drivers. Despite signage that cautions a driver that a railroad crossing is at hand, flashers and bells that warn of an approaching train, and in some cases crossing gates that are lowered and flashing, drivers with impaired decision-making choose to pull out in front of an approaching train. At best, the individual and any passengers will walk away with little or no injuries, but often, or not, will require a trip to the hospital for some kind of medical treatment. If they have no insurance or don't have the funds to pay for treatment, the hospital will have to eat those costs of treatment. If the hospital can't recover these expenses, then they have to make them up somewhere else, and we all know who ultimately pays. We all do in higher medical services. In a more serious situation, the driver will require extensive medical treatment and incur significant bills that are either uninsured for or they have no insurance and they come looking for someone that the law allows them to sue. That is our culture today. And the bar that overserved the injured party and put this tragedy in motion is off the hook, so that the injured party turns to the railroad involved. The railroads have learned from past experiences it has to invest the financial resources early on in a train/vehicle accident to thoroughly investigate the accident to be able to defend itself in the advent of litigation. This investigation will involve a quick response team that includes claims investigators and an attorney traveling to the site of the accident to secure evidence and identify and

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interview witnesses. This is an expensive cost in time and dollars for a railroad, whether it's Union Pacific Railroad, Burlington Northern, or some other short-line railroad that operates in the state. The same could be said for trucking companies that operate on our state's roads. They too would have to invest the time and dollars to defend themselves. If a dram shop law were enacted in Nebraska, it would actually be business-friendly because it should lead not only to fewer railroad crossing accidents, but also fewer auto accidents in general. And right now in those vehicle accidents the bar and its owners who are the primary contributors to individuals being overserved do not share in the financial cost and the responsibility for that cost. Today, the entire cost and burden is shouldered by business. [LB1075]

SENATOR ASHFORD: Jim, thanks. I'm going to ask you to sum up if you would. Go ahead and sum though. Go ahead and sum up. [LB1075]

JIM GREELIS: Okay. Let's not also forget that we've got municipalities that are also getting named in these lawsuits, whether they be at the city or the state or the county level. And it's a cost to these states. So... [LB1075]

SENATOR ASHFORD: And I think you make a great point that we deal a lot in this committee is the idea of the shifting of costs. And I...if somehow people think that the general public is not aware of what happens when those costs are shifted, I think they misunderstand the level of awareness the public has. I think that we understand and I think the public understands that when something like this happens someone has to pay the cost. And whether it's the UP Railroad, other businesses, the state, or whatever, I think that's a point that has to be made over and over again in cases like this, so thank you. Next proponent. [LB1075]

SIMERA REYNOLDS: (Exhibit 6) Hello, Senator Ashford and the committee members. Thank you for having me here. Senator Carlson, thank you for introducing LB1075. My name is Simerá, S-i-m-e-r-a, Reynolds, R-e-y-n-o-l-d-s. I'm the executive director for Mothers Against Drunk Driving. On behalf of MADD and our members and our victims and our survivors, I am here to support LB1075. MADD would very much like to see Nebraska join the 42 states that currently have dram shop laws in place in some form. MADD supports LB1075 as a measure to ensure equitable treatment from state to state for victims that are impacted in an alcohol-related crash, a 100 percent preventable crime. And it's not an accident--it really is a car crash. Research clearly shows that when implemented there's a 5 percent reduction in alcohol-related fatalities, and I know Dr. Osborne presented you with some of the material that supports that and so I won't reiterate it. But to Nebraska, a 5 percent decrease would mean three lives saved. And so many times I've heard on the legislative body: if we could save one life. We say that all the time, and we say it with sincerity. Well, here we have the potential not to just save one life but the potential to save possibly three lives. Three lives where there's a provider, there's a family member, there's a son, a husband, a daughter, a brother, a

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sister, a grandmother, a mentor, a caregiver. We don't want to lose that person in our community and we want the quality of life to stay intact. MADD knows, all too well, patrons are overserved. They're overserved; they get into a car; they drive drunk. Nationwide, the median BAC for alcohol-related traffic deaths is 1.7. In Nebraska, it's 1.59. Research shows us that last year there were 13,660 arrests in 2008, and approximately one-third of those arrests were high BACs of 1.5 or higher. LB1075 would provide a recourse for victims impacted in an alcohol-related crash, a recourse that is allowed in 42 other states that is not allowed here. MADD strongly urges your support for LB1075. And on a personal note, especially since Senator Lathrop is here, I'd like to let you know that I have had the opportunity in Colorado to go through a dram shop arbitration. I had a family member that was impacted by a drunk driver, and Colorado has a dram shop concept. It worked, and she was...my mother was able to get some monetary funding to maintain her prosthetic teeth for the rest of her life. [LB1075]

SENATOR ASHFORD: Thanks, Simera. Thank you. Thanks for your comments. Diane. [LB1075]

DIANE RIIBE: Good afternoon, Senator Ashford, members of the committee. My name is Diane Riibe and I'm the director of Project Extra Mile, a statewide network of community coalitions working to prevent underage drinking, and we also thank Senator Carlson for his courage and his leadership in bringing the proposal forward. We know that approximately 50 percent of drinking drivers start their intoxicated journey--from the literature--from licensed establishments. Sales to intoxicated laws appear to go largely unenforced according to research commissioned by the National Highway Traffic Safety Administration. In fact, in a qualitative research study that collected data on key issues specific to enforcement and adjudication of these laws, cited the single most notable finding to be that enforcement of these laws--sales to intoxicated--across the country is relatively rare, and that's according to research done in 2009. To be clear, by enacting a dram shop law for sales to intoxicated in Nebraska, we're not opening the floodgates to civil lawsuits across the state. The economic burden in these types of scenarios is significant. The average cost per death--so we're talking one individual--associated with alcohol-related fatal crashes in Nebraska in 2008 is just over \$1.1 million. Dram shop and social host liability are intended as a deterrent as preventative action taken by the state, as well as a reason for adults to take pause in what action they might have and the behavior and choices they might make in selling alcohol to intoxicated persons. I would say that also dram shop would motivate adults to take responsible action to protect young people and those innocent third parties. We have been, unfortunately, and it's--Senator Kruse certainly led--but it's been far more than five years before that time, but we have been, for some reason, consistently reluctant to extend that level of liability to businesses. If we're serious about protecting Nebraskans, then we must begin to take a serious look and adopt a dram shop that is a full measure in this state. And I would just close by saying certainly if the language is not as it needs to be, Senator Council and others, there's model language that's out there. That's an easy fix. I would

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suggest that the bill and the proposal address all license holders. That's important. And then finally I would just tell you that I've had and we've had at Project Extra Mile the privilege of working with Michelle and Anna Jo, and I have in my nearly 20 years never worked with a family that has been more dedicated, more professional, more determined. And for lowans to be so kind to Nebraskans is phenomenal that they have done the kind of work that they have done to change our laws, and hopefully we pay attention. [LB1075]

SENATOR ASHFORD: Thank you. Senator Lathrop, then Senator Council. Diane, we have a couple of questions. [LB1075]

SENATOR LATHROP: I just wanted to ask, we did pass the Minor Alcoholic Liquor Liability Act with Senator Kruse's leadership. [LB1075]

DIANE RIIBE: Yes. [LB1075]

SENATOR LATHROP: In fact, it was his bill. And that imposed a kind of a dram shop for minors, which involved social host liability if you have a beer party at the house or liability for retailers who sell to minors. Can you tell us what effect that's had on underage drinking, if any? [LB1075]

DIANE RIIBE: Well, at this point, Senator, it's a good question. I don't know that we can see measurables. That's very difficult, particularly with the process that's used to collect some of that data. But, number two, there are no cases that we are aware of where there has been a dram shop suit filed. Although we monitor some of those cases, I can tell you there's probably at least ten cases in the state right now where there is a potential recovery that could be pursued. That's not obviously something that we do. [LB1075]

SENATOR LATHROP: Okay. Thank you. [LB1075]

SENATOR ASHFORD: Senator Council. [LB1075]

SENATOR COUNCIL: Yes, thank you, Senator Ashford. And thank you, Ms. Riibe, for your testimony. And I'm...I know you were present during my questions regarding the one section,... [LB1075]

DIANE RIIBE: Good questions. Yeah. [LB1075]

SENATOR COUNCIL: ...and that is troubling. But even getting to the issue of intoxication, now the bill, LB1075, defines intoxication and applies a different standard of intoxication than the standard we applied for driving under the influence. [LB1075]

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DIANE RIIBE: Well, I can tell you that the Liquor...and perhaps Mr. Rupe, if he's testifying later--I'm not sure. But the Liquor Control Act still uses the .10 standard, which may be something we want to look at, but as the standard we use for drinking drivers at .08, the Liquor Control Act actually identifies measures for what we would look at intoxicated. I think what's important to note is that there should be no change in the standard necessarily. There's already a violation of the law, so it's not as though we have to prove something that's not already needing to be proved right now. It's just proven in a civil process. [LB1075]

SENATOR COUNCIL: Okay. But the point is that under LB1075 intoxication means "an impairment of a person's mental or physical faculties as a result of his or her use of alcoholic liquor so as to diminish the person's ability to think and act in the manner of a reasonably prudent person." So that requires some evidence beyond the mere BAC level, and then who...I mean, and how is that determination to be made? [LB1075]

DIANE RIIBE: I don't know that I'm the best person to kind of explain it, but I will tell you, Senator, that the expectation and the standard ought to be consistent across those statutes, so... [LB1075]

SENATOR COUNCIL: Yeah, because you could have someone who, with a .07, a .06, who's not legally intoxicated under the DUI, could subject a bar owner to liability under the dram shop, or at least to a lawsuit. [LB1075]

DIANE RIIBE: Right. Well, as you know better than I, anyone can sue anyone for anything. So I guess I would say again that the standard ought to be consistent across the statutes, and the .08 standard, quite frankly, ought to be relevant. [LB1075]

SENATOR COUNCIL: Thank you. [LB1075]

SENATOR ASHFORD: Diane, I do agree with you about Michelle and Anna Jo and their professional approach. I don't think I can recall anyone who's exhibited such professional advocacy in my career--and it's longer than 20 years--and especially a family that has undergone such trauma, so. [LB1075]

DIANE RIIBE: Yep. And we should pay attention. [LB1075]

SENATOR ASHFORD: We should and we are. [LB1075]

DIANE RIIBE: Yes. Thank you. [LB1075]

SENATOR ASHFORD: Okay. We'll have one more proponent and then we'll move to the opponents. Do we have another? One more proponent and then we'll go the opponents. [LB1075]

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MARK BONKIEWICZ: Good afternoon, Senators. My name is Mark Bonkiewicz. I'm originally from Sidney, Nebraska, in the southern part of the Panhandle. I now live at 108th and Q Street area in Omaha, Nebraska 68137. I'm a self-employed business consultant. As I listened to the testimony of the citizens who have come here today, my heart aches. One of the primary responses I hear from the Judiciary Committee members is: How do we know when these drinkers are getting intoxicated? Could I suggest that we use some common sense to solve this dilemma. For example, I know that if I eat a second helping of dinner, I'm fuller than when I ate my first. I know that if I drink six beers, my chances of being intoxicated are a lot higher than if I drank three. But what I'm hearing is we need objective criteria. So how about this idea? I have never met a bartender or a cocktail waitress who could not count at least to ten correctly in numeric order. I would suggest that a solution is that if you want to have a liquor license and serve liquor for consumption, that you have to have a Breathalyzer in your bar or lounge. And the second solution is that if any employee in that establishment has any suspicion that a patron is getting closer to intoxication, then they have a responsibility to have that customer take a Breathalyzer test. And if that customer is approaching the point of which they are definitely .08, that they have to say: I'm sorry, sir, I'm sorry, ma'am, I cannot serve you any more. And if it's good enough for our law enforcement personnel, our state patrolmen and patrolwomen who are taking care of us and the folks in the police departments, it certainly ought to work well in the liquor industry. Thank you. [LB1075]

SENATOR ASHFORD: Thanks, Mark. There may be some questions. I don't...but that is a commonsense suggestion. [LB1075]

SENATOR LATHROP: Maybe just... [LB1075]

SENATOR ASHFORD: Yes, Senator. [LB1075]

SENATOR LATHROP: ...have you had a personal experience with this? I'm...we don't get people that drive down from Omaha without...typically, without understanding what their particular interest is. [LB1075]

MARK BONKIEWICZ: I did not come here to testify for this bill today. I'm waiting for the next bill to come down the pike. I'm just sitting here, going... [LB1075]

SENATOR LATHROP: You just felt strongly about it. [LB1075]

MARK BONKIEWICZ: Oh, my gosh, listen to the hearts ache. Listen to the \$1 million per loss. And we can't expect an establishment to invest in a \$400 or \$500 piece of equipment that's been proved and tested and works by law enforcement and it will stand up in a court of law? Folks, let's get to some common sense. [LB1075]

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SENATOR LATHROP: Good. Thanks, Mark. [LB1075]

SENATOR ASHFORD: Thanks for testifying, Mark. Thanks. We're going to move to the opponents. How many opponents do we have actually? A few. Okay. Jim, do you want to come up, or...? Moving it right along here. [LB1075]

JIM MOYLAN: (Exhibit 7) Mr. Chairman and members of the committee, I'm Jim Moylan, M-o-y-l-a-n, attorney and lobbyist for the Nebraska Licensed Beverage Association, which is a state association of liquor retailers. A little bit about the retailers: As you know, there's over 4,000 of them in the state, and they serve every element, everybody here, from the corner bar to the bar with a bar and restaurant, to the grocery stores, the convenience stores, the drug stores, your service clubs, your veterans' clubs, and your special designated license for all the churches and the like, you know. These are who the retailers are in the state, and they do serve their communities. Number two, we sympathize with everybody here who has happened to have been injured by a person who has been drinking, you know, and all of the retailers sympathize that they will never knowingly or intentionally serve a person to the point where they would cause damage to anybody. Now a little bit about the act. As you know, these are called third-party actions, and it's not in the law. Generally, they're two-party actions. But there's other places where it's working its way in. Gun shop owners sell guns. They're beginning to be sued because they sold a gun to somebody who shot somebody. We are seeing the fast food companies emerging as a good target to sue because they are making people obese and affecting their health. And this is the same type thing: third party. There's got to be some personal responsibility of the individual who caused the damage. That's the proximate cause: the person who caused the damage and not the particular liquor establishment. Most of you have covered the act here and pointed out social hosts are not included; special designated licenses are. Now social hosts, they're not experienced in serving alcoholic beverages like these retail establishments are, but consequently, you know, they ought to be included. They're more inclined to serve people who are intoxicated than what a bar establishment is. The standards here, just negligence, probably ought to be gross negligence and a visibly intoxicated person. There's just a couple or three of them. Now I handed out some eight quotes...seven quotes from dram shop establishments in Iowa that came from a reputable insurance agent in Omaha. And the seven of them starts...the first one, if you have \$12,000 worth of liquor receipts the dram shop premium would be \$750 a year. It goes up to a \$230,000 worth of liquor receipts in a year, and that premium is...for \$500,000 is \$4,000. Now you get...you're going to find places that are going to have two, three, and four times that type, so the premiums can go all the way up to \$20,000 to \$30,000. So it's a costly thing. I notice the red light is on. I'll stop. [LB1075]

SENATOR ASHFORD: Any questions of Jim? Jim, let me ask you a question. If...and

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this is not really even hypothetical because it's the Cowan case. If someone was in a tavern for two or three hours, drinking consistently one drink after the next, and did that on a consistent basis, not just one day but maybe several days, if a bartender or owner observed that activity and that degree of intoxication, wouldn't that be, under any responsible standard, gross negligence to allow that person to get a car and get in a car and drive somewhere? [LB1075]

JIM MOYLAN: I think if you found somebody like that, if you put the standard of gross negligence in there, then I think, you know, that could be. [LB1075]

SENATOR ASHFORD: I mean, that's my thinking. I think the Cowan case is so incredibly obvious that, that if you...and if the standard is gross negligence, that's gross negligence. [LB1075]

JIM MOYLAN: I would say that would be, and there's very few establishments that... [LB1075]

SENATOR ASHFORD: Just so...wouldn't it be responsible to set some kind of standard like that of gross negligence for a liquor establishment or...? And I agree with you, there are 4,000 liquor establishments and they're contributors to their community and they are all those things. But if there's gross negligence exhibited and there's significant damage--a death in the Cowan case--which results in significant damage to that--emotional and monetary--to that family, I... [LB1075]

JIM MOYLAN: Well, it's a departure from our law, and our court has said, you know,... [LB1075]

SENATOR ASHFORD: Well, it's a departure from current law, obviously, but I mean...but we do that from time to time in this committee. We depart and go off into other areas, but I... [LB1075]

JIM MOYLAN: It's a departure from the proximate cause, you know, which is an old legal establishment going on for years. But true, there's not a... [LB1075]

SENATOR ASHFORD: There's more of a connection than in the Pahlsgraf case though. I mean, if you... [LB1075]

SENATOR LATHROP: Don't go there. [LB1075]

SENATOR ASHFORD: Nevermind, I'm not going to go there. But seriously, I guess I've been here 12 years, and I've been in the Judiciary Committee a long time, and it's kind of hard to...so I'm one of those senators, Mrs. Cowan, that we haven't done...we haven't reacted in the way that you'd like to see us react. But it seems to me that there is a

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gross negligence standard out there for that kind of activity. [LB1075]

JIM MOYLAN: Well, I think gross negligence but not just plain negligence--and of a visibly intoxicated. [LB1075]

SENATOR ASHFORD: Yeah. [LB1075]

JIM MOYLAN: And I've said, a hundred times before, before you people: There's two people that these establishments do not want in their place, and that's a minor and an intoxicated person. That ruins business. [LB1075]

SENATOR ASHFORD: And I'm not disagreeing with you, Jim. I just think there's some standard out there where we can protect citizens more effectively, so. [LB1075]

JIM MOYLAN: Yeah. [LB1075]

SENATOR LATHROP: One thing that's missing from this discussion it seems to me, is that we're not telling bar owners that they can't serve people until they get past .08. They just got to be responsible to make sure they're not jumping in their car and driving home. There's a lot of things besides stopping somebody from drinking that are a solution to this issue it seems to me. And what's missing is having some responsibility to say: You need to leave your keys here and come get them in the morning. And I agree with Senator Ashford. [LB1075]

JIM MOYLAN: And some of them do that, you know, or arrange cabs for them. Your cabs. [LB1075]

SENATOR LATHROP: I know the last time we heard this bill, though, somebody came and sat right in that chair and said this person couldn't put the key in the car or the door, and the bartender helped him, and... [LB1075]

JIM MOYLAN: I'm not saying there aren't exceptions. If there weren't exceptions, there wouldn't even be a bill in the Legislature today. There are. [LB1075]

SENATOR LATHROP: Right. [LB1075]

JIM MOYLAN: But I'm saying 99 percent of them, you know, follow the law, do not serve intoxicated persons and certainly don't want to. But you're going to find that 1 percent and they're the ones you're talking about. [LB1075]

SENATOR ASHFORD: And that 1 percent might result in a tragedy like the Cowan case, and I think we have to think about that as we... [LB1075]

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JIM MOYLAN: Yeah. [LB1075]

SENATOR ASHFORD: But I appreciate your candor, Jim. Thanks. [LB1075]

JIM MOYLAN: You have to think about it. Yeah. All right, thank you. [LB1075]

SENATOR ASHFORD: I'm sorry. Senator Council has a question, Jim. [LB1075]

SENATOR COUNCIL: I just had a question, Mr. Moylan. You said that the documents you provided, the bar itself is deleted, but these are actual quotations for liquor liability renewals? Is that what this document is? [LB1075]

JIM MOYLAN: Yeah, that's for dram shop insurance on establishments in Iowa just quoted this last fall from Moore's Insurance agency in Omaha. And they...as you know, they start at \$12,000. A sale a year is nothing--\$750 premium, that's a minimum. And then the one with just \$230,000 a year is \$4,000, and that's not even much. You know, you're talking about some with \$800,000, \$900,000 a year. So it's going to be \$20,000, \$30,000 for dram shop insurance. [LB1075]

SENATOR COUNCIL: And just a point of information. When I began my operations, I was aware that Nebraska did not have a dram shop law, but I was concerned about liability under some negligence standard--gross negligence--and so I inquired about liquor liability insurance. And even in a state that didn't have a dram shop law, and I was just starting so there was just a projection, my premium was \$8,000 for a year. So just...I mean, just FYI. [LB1075]

JIM MOYLAN: Um-hum. Yeah. [LB1075]

SENATOR ASHFORD: Thanks, Jim. Thank you. Other opponents? Jim. [LB1075]

JIM OTTO: Senator Ashford and members of the committee, my name is Jim Otto, spelled O-t-t-o. I am president of the Nebraska Retail Federation, also a registered lobbyist for the Nebraska Restaurant Association, and I'm here on behalf of both organizations to testify in opposition to LB1075. First of all, I'd like to say that I purposely wore what I thought was appropriate for a serious situation. This is not funny. This is a very serious time, and I have gray and black on because of that. And I want to convey the respect of both associations for Senator Carlson, Senator Kruse, Dr. Osborne, the families of all of those affected, because we do not take this lightly. I just want to say on behalf of the associations that...well, when you go to a restaurant, alcohol is kind of an incidental thing to your meal. And this bill takes in everybody, not just the bad actors, the 1 percent that have been talked about before. And we think the challenge is figuring out how to address that 1 percent. And then the other thing we also think that it really needs to include is social hosts, because social hosts are a huge factor in those who

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drive intoxicated. With that, I'd like to end my testimony for those two organizations. Then I also turned in a sheet myself as an individual. And I would just like to say as an individual that--and I can't say this on behalf of the associations because I don't have the approval of their boards of directors--but I personally welcome the opportunity with Senator Kruse to work on a bill that would require server training that we could figure out or at least make an incentive to have every server trained and the things that were brought up before about the server not thinking twice about serving this person. The real problem, in my opinion, is servers and sellers not being trained, not being...not knowing how to recognize an intoxicated person and not knowing all the signs. And so I just, as an individual, would pledge to work towards that end with the two associations. With that, I'd be glad to answer any questions. [LB1075]

SENATOR ASHFORD: Thank you for that offer, Jim. Any questions of Jim? And thank you. I did...Senator Coash--I'm sorry--has arrived. You arrived awhile ago...but welcome. Thanks, Jim. Sam. [LB1075]

SAM HOHMAN: (Exhibit 8) Senator Ashford and the Judiciary Committee, you have the statement of my husband and I. We are in a unique position in that we are new bar owners. We chose to pursue that endeavor a little over a year ago. [LB1075]

SENATOR ASHFORD: Sam, give us your name. [LB1075]

SAM HOHMAN: Pardon me? Oh, I'm sorry--Sam Hohman. We looked a lot at a number of different businesses, and I can tell you wholeheartedly we would not have gone into the bar business if a law such as this existed. It makes it very difficult for bar owners. We are 100 percent behind proper insurance and proper liability insurance. The problem with this bill is it goes far beyond that. Dave and I, we have three children. If anything ever happened to them I would hope that I would have the courage and the passion that the Cowan family has and the Ramspott family. But on an economic basis, this makes it almost impossible for bar owners to stay in business. Again, it's not a matter of wanting to shirk the liability or to not be sensitive to those issues. Certainly we train our employees. I have gone through a lot of different liquor liability trainings. It just...it creates an almost strict liability standard for us and removes the ability for us to defend ourselves in many, many situations. [LB1075]

SENATOR ASHFORD: Thanks, Sam. Any questions of Sam? Thank you, Sam. Kathy. [LB1075]

KATHY SIEFKEN: Senator Ashford and members of the committee, my name is Kathy Siefken, S-i-e-f-k-e-n, representing the Nebraska Grocery Industry Association as their lobbyist and their executive director. And the stories that we heard today were heart-wrenching and my heart goes out to those families. But there were people that sat in the chair and talked about 42 states that have some form of dram shop law and that

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Nebraska is not one of them, and I contend that we do have a dram shop law for the youth and that was the bill that Senator Kruse passed a couple years ago. So we do have some. [LB1075]

SENATOR ASHFORD: That's a good thing. [LB1075]

KATHY SIEFKEN: Pardon me? [LB1075]

SENATOR ASHFORD: That's a good thing. [LB1075]

KATHY SIEFKEN: Well...and we all worked on that together because it is an important issue. We're just one amendment away from being wrapped up into this and that's why we're here in opposition. We think that the person that is consuming the alcohol probably has a personal responsibility in how much they consume. And I'll tell you a story. It was one of the football games this fall, and we didn't get it on TV so a group of us went down to the bar and we all drank responsibly, but there was one person that was the designated driver and we sat there and watched that game for three hours. And it wasn't until probably halfway through the fourth quarter--and the TVs were here, and down below us were tables so we could look down--and there were people drinking. They were having a good time. No one seemed to be doing anything they shouldn't have been doing, until I finally noticed that this one guy, he was sitting there real quiet so he wasn't drawing any attention to himself, and his friends were going up to the bar and getting alcohol and feeding him all night long. And the guy sat there quiet. He didn't do anything until the last drink came, and he was so drunk that he reached over to grab the drink and he fell down and the drink tipped over, and that's when everybody realized how drunk he was. He was already intoxicated. The bar didn't serve him; it was his friends that did that. And so with this kind of a bill, who's really at fault there? Is it the bar? They had people...they had a doorman standing ten feet away and he didn't notice. I was in direct line of sight; he was right under the TV. And those are the issues that we're kind of concerned about. [LB1075]

SENATOR ASHFORD: And I think...those are the issues I think can be sorted out. But anyway, but I do appreciate your efforts on the other bill and I think that they are appreciated. Senator Lathrop. [LB1075]

SENATOR LATHROP: So what happened? What's the rest of the story? [LB1075]

KATHY SIEFKEN: The rest of the story is they kicked him out of the bar with all of his friends. Now what kind of a deal is that? [LB1075]

SENATOR LATHROP: Nobody said, how are you getting home? [LB1075]

KATHY SIEFKEN: Oh, no, there were people... [LB1075]

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SENATOR LATHROP: Nobody said, how are you getting there? Anybody check to see if he was driving home? [LB1075]

KATHY SIEFKEN: He had a bunch of people with him that held him up. [LB1075]

SENATOR LATHROP: Okay. [LB1075]

SENATOR ASHFORD: That's gross...that's gross...Kathy, that's gross negligence on... [LB1075]

KATHY SIEFKEN: But he sat there and you couldn't tell he was drunk. [LB1075]

SENATOR ASHFORD: Well, but he fell down. [LB1075]

KATHY SIEFKEN: Yeah, and as soon as he fell down, he was out. [LB1075]

SENATOR ASHFORD: I know. Then what do you do? (Laugh) [LB1075]

KATHY SIEFKEN: But he wasn't out by himself; he was out with his friends who were going to take care of him. [LB1075]

SENATOR ASHFORD: I understand. I understand what you're saying. Your point is... [LB1075]

KATHY SIEFKEN: So maybe his friends should be held liable. [LB1075]

SENATOR ASHFORD: Maybe they should. Thanks, Kathy. Senator Rogert has joined us--what's left of Senator Rogert. [LB1075]

JOE KOHOUT: (Exhibit 9) Good afternoon, Chairman Ashford and members of the Judiciary Committee. For the record, my name is Joe Kohout, K-o-h-o-u-t, registered lobbyist appearing on behalf of the Associated Beverage Distributors of Nebraska. I've offered a letter, for the record, on behalf of our association, recognizing our support of the legislation which has already been referenced and Senators Ashford and Lathrop worked on so hard three years ago. And so with that we'd offer our opposition, and that's all I have to say. [LB1075]

SENATOR ASHFORD: Okay. Thanks, Joe. [LB1075]

JOE KOHOUT: Thank you. [LB1075]

SENATOR ASHFORD: Any other opponents? Any neutral testifiers? Okay. [LB1075]

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HOBERT RUPE: I thought there was going to be more opposition before I got a chance to get up and get the paper. Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Hobert Rupe. I'm the executive director of the Nebraska Liquor Control Commission. The commission has always been neutral on this in the fact that it's a private cause of action. We did put in a fiscal note. And I sort of have a rule. If I'm going to put a fiscal note in, I'm going to make sure I'm available for any questions regarding it. In this case here, we've got about a \$10,000 fiscal note. We actually think it's pretty conservative. The bill as it said is going to require the commission to sort of set the minimum amount of policy that a bar owner or licensee would have to have. We thought we would probably have to contract with an underwriter for an analysis to get some expert opinions on that, as well as look other states. So we're trying to do it as economically as we can, but we thought there would be some fees attached with that. That's where that fiscal note comes from. A couple other issues that sort of came up. The advantage of going about neutral, you sort of answer some questions. You know, currently the only regulation against service to a visibly intoxicated is actually a Liquor Control Commission regulation. It actually takes up an entire page of the book. And we actually do enforce that quite often. In fact, we have hearings coming up in the next two days. I believe there are at least three formal citations against service to a visibly intoxicated. Now from our perspective--and I'm sure Senator Council would know this as a bar owner because we assume that they know the Liquor Control Act on it--the bill there, if you read our rule and regulation...and although it does have the old .10 in there, it's not really...it's sort of a different standard than if somebody is intoxicated to drive. It's a visibly intoxicated standard, and there's a whole laundry list of using such language as indicators, included but not limited to problems with balance, inability to maintain balance, i.e., stumbling, staggering gait, bumping into furniture while walking, falling against bar, off stool, head on the bar, ineffective muscle coordination including spilling or knocking over drinks, unable to pick up change, strong smell of alcohol, slurred speech, bloodshot, glassy, watery eyes. And so the...it's very much a...somewhere along the line somebody who is consuming alcohol is probably no longer in the best position to make the decision to continue to consume, and that should have been shifted to a responsible license holder. I mean, that's what that regulation is. I'm on the yellow light; I'll get to the last part. Just to bring you up to speed on the training: As you're well aware, training was passed...I mean, it was not mandated. And so the commission was sort of left with training--What are we going to do with it now? And what we've done with it has actually been very proactive. Most times when someone comes in front of us for a first offense, if you're looking at the--that we're trying to do progressive discipline and get somebody back into compliance--not only will they often get a 10- to 20-day suspension, but they'll have 60 days to complete one of the approved training courses or one of the certified training courses. There is the on-line certified training course that the state sponsors through the NU Directions. There's also many private vendors which we've certified. I've had the privilege of going through all seven of them, sitting through all of them to evaluate them.

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So I just wanted to bring you up to speed of how we were using the training currently. And since I'm on the red, I'd be happy to answer any questions. [LB1075]

SENATOR ASHFORD: Any questions of Hobie? [LB1075]

SENATOR LATHROP: Just whether the training is effective. If you have somebody...you make...you don't mandate training right now. Somebody gets caught serving somebody intoxicated, you give them a citation. They come in, and the hand-slapping is you're going to go through server training. What's your experience with it in terms of stopping them from serving people to intoxication? [LB1075]

HOBERT RUPE: Well, generally it's more of just a hand slap, because usually there's also a 10- to 20-day suspension which is going to be a \$1,000, \$2,000 fine. [LB1075]

SENATOR LATHROP: I didn't mean to suggest that it was not bad enough, but. [LB1075]

HOBERT RUPE: Very...so far, and it's still somewhat early. We're not seeing a lot of recidivism in people we've actually mandated training on. You know,... [LB1075]

SENATOR LATHROP: But you don't keep any statistics on how many...where people come from? [LB1075]

HOBERT RUPE: We've only been doing it for three years. I mean, we keep track on where they're at. We keep track of it if they come in. And I don't have that document; I can pull up that issue. But just from my looking at it, from seeing people who come back in front of us a second time, I'm not seeing a lot of people who we've mandated training on. And if they do come back, I've seen, if anything, the commission are even more likely to drop the hammer a little bit harder on them for a violation. Because, you know, they tried to get them into compliance, and there is at least an indication that they've bailed. [LB1075]

SENATOR LATHROP: Okay. Thanks. [LB1075]

SENATOR ASHFORD: This is really hypothetical, but Hobie, as a lawyer looking at those criteria in the regs, in your opinion, if a bar owner observed those particular acts by a patron or lack of--the laundry list there--would that constitute gross negligence if they...in your view, if they...if an individual did those things and a patron did those, some of those things, and the bar owner observed them? Would that...if the bar owner did nothing or the server did nothing, would that be, in your view, gross negligence? [LB1075]

HOBERT RUPE: I think, depending on the facts, of course, I think it definitely could be.

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[LB1075]

SENATOR ASHFORD: Or could be. [LB1075]

HOBERT RUPE: It definitely could be. The ones we see...normally, the ones we see, we're not talking about somebody at .10, .12. We're seeing people at .20, .21,... [LB1075]

SENATOR ASHFORD: Right. [LB1075]

HOBERT RUPE: ...where, you know, any reasonable person should realize that person is in an intoxicated state and should no longer be served. [LB1075]

SENATOR ASHFORD: Right. Steve...maybe Steve...are those rules...are they admissible in a civil case? [LB1075]

SENATOR LATHROP: Yeah, I suspect they would be as a measure of the standard of care. [LB1075]

SENATOR ASHFORD: They would be. They would be admissible as standards of gross negligence or negligence or whatever. Okay. Thanks, Hobie. Other neutral testifiers? [LB1075]

TIMOTHY REGLER: (Exhibit 10) Good afternoon, Senators. My name is Timothy Regler, R-e-g-l-e-r. I'm from Nebraska City. I am here in my capacity as a beverage server trainer. I run a program in Otoe County, and part of my duties is to train bartenders, wait staff in the TIPS program. You're being handed the manuals that we use in our TIPS training classes. TIPS is the, I believe, largest training course of its kind in the nation, and it is one of those courses that is certified by the Nebraska Liquor Control Commission. I thought it might be helpful for you to have a copy of our manual and see the things that we do teach the waiters and bartenders and waitresses in our courses. We offer these courses free of charge in Otoe County to anybody who wants them. If they live outside of the county, the charge is \$15. I would bring particular attention to page 7 of the manual which covers the behavioral cues that we teach in terms of identifying people and their intoxication levels, the warning signs that perhaps they are on that level of intoxication, the intoxication rate factors, blood alcohol content and how the alcohol is absorbed through the liver, and also the time it takes for an ounce of alcohol to wear off, so to speak. So I hope this is helpful. I've put my name and phone number on the front of each one. If you have any questions after you look at the material, I'd be happy to answer them, or if you have any questions now I'd sure be happy to answer them. [LB1075]

SENATOR ASHFORD: Questions of Tim? Seeing none, thank you. [LB1075]

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TIMOTHY REGLER: Thank you. [LB1075]

SENATOR ASHFORD: Neutral, last...is this the last neutral testifier? I think so. Good afternoon. [LB1075]

AL RISKOWSKI: Al Riskowski, Nebraska Family Council. Riskowski is R-i-s-k-o-w-s-k-i. Just quickly, in my 25 years of pastoring I've seen the devastation of alcohol--plus being at Nebraska Family Council--the devastation on families. I see the difficulty of a motivation of a bar owner of making money, because that means he needs to serve alcohol, but at the same time we're saying: Be safe. And surely, if you're going to serve a drink that can severely distort one's judgment, should have some responsibility. And I guess I'm here today to speak not only for people who have been hurt by drunk drivers, but drunk drivers who are hurting themselves on the road. [LB1075]

SENATOR ASHFORD: Be neutral, Al. [LB1075]

AL RISKOWSKI: I'm neutral. [LB1075]

SENATOR ASHFORD: Okay. [LB1075]

AL RISKOWSKI: And so I'm hoping for a bill that would not only help to stop people being hurt by drunk drivers, but drunk drivers hurting themselves. And if this is the vehicle that we can use to do that, to do both situations, I hope that senators will sincerely look at that and evaluate it. So thank you. [LB1075]

SENATOR ASHFORD: Okay. Thank you. Any questions? Seeing none, thanks. [LB1075]

MICHELLE COWAN: Can I make one comment? [LB1075]

SENATOR ASHFORD: Oh, I think we'll just let Senator Carlson close. Thanks, Michelle. [LB1075]

SENATOR CARLSON: Thank you, Senator Ashford and members of the committee, for hearing this bill. I won't make any comments about the proponents of the bill. I think that their testimony spoke for themselves. Those who were in opposition, I sat there and listened to some of the things that were said. And, of course, I expected and knew that personal responsibility was going to be brought up on the part of the person buying the alcohol. I don't disagree with that. The statement made that 99 percent of those that run establishments that sell liquor do things the right way, if that's anywhere accurate, let's take care of the 1 percent. And it shouldn't be a huge price onto the insurance that people have to buy. It was interesting, too, a comment was made that...and I don't know

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much about this, but I would assume if you own an establishment, one of the worst things that you have in terms of business is an obviously obnoxious drunk customer. You're better off without them, and probably a challenge as to how you get rid of them. And then the idea of acceptance of the fact, if we could somehow measure and determine gross negligence, it makes sense to have something in place that would deal with that. A comment by one, that if we have to have this insurance we can't stay in business. I sympathize with that, but I'm not sure how that's a whole lot different than a trucking company that would say that if we have to have liability insurance and insurance that covers our vehicles in the event of injury, we can't stay in business. That's a part of business. It's a cost of staying in business. And if an establishment has a doorman or a bouncer, I'm not sure what their responsibility is. I would assume one of them is to intervene for fights, but it also ought to be observing what's happening. And I would think that if somebody is trained that way, then that individual gets so intoxicated they can't stand up, that's going to be seen before it actually happens. But I thank the testifiers for coming and you for listening, and I would work in any way that I could to word a bill and get it into a form that would be acceptable. [LB1075]

SENATOR ASHFORD: (See also Exhibits 14-22 and 27.) Thank you, Senator Carlson. Thank you for your comments. That concludes the hearing on LB1075. We'll now move to Senator Fulton who is here on LB765: change criminal laws related to gambling. [LB1075 LB765]

SENATOR FULTON: Thank you, Mr. Chairman and members of the committee. For the record, my name is Tony Fulton, T-o-n-y F-u-l-t-o-n, and I represent District 29 at the Nebraska Legislature. I'm here today to introduce LB765. This legislation addresses the problem of bona fide amusement devices being mismarketed and misused for gambling purposes. I should also mention that this is a bill that I brought on behalf of the Attorney General's Office, and the Attorney General has people here to testify following. LB765 expands the definition of gambling by adding "the operation or play of a gambling device" to the statute. In addition, LB765 amends the definition of gambling device to clarify the distinction between a mechanical game of chance and a bona fide amusement device where success is based upon the skill of the operator. Prior to this amendment, the definition did not contain a reference to the chance versus skill issue. The definition had to refer back to the gambling definition for guidance. This bill clarifies the issue by bringing the guidance language into the statute. Specifically, the change clarifies that a device which through the application of an element of chance has the capability of awarding something of value is a gambling device. It also clearly establishes that the definition does not include any device or machine where a person stands to win or lose based predominantly on the skill of the operator. The skill-based devices would be what we refer to as bona fide amusement devices. The statute as it currently exists provides that bona fide amusement devices still could be improperly used for illegal gambling purposes. Therefore, LB765 adds restrictions on what such devices can award. The skill-based devices cannot have an award value of greater than

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\$10. The skill-based devices cannot award a cash, alcohol, or tobacco prize, nor can it award a prize which can be exchanged for cash, alcohol, or tobacco. Finally, there is a portion of LB765 which is devoted to removing a portion of the existing statute which has previously been found unconstitutional. In State of Nebraska and Spire v. Strawberries Inc., in 1991, the court found that free replays are something of value which could not be awarded when playing a game of chance. Therefore, the provision stating otherwise has been removed and that appears also in this bill. I'll defer technical questions to the AG's Office to follow; however, I would be glad to answer any questions the committee has. [LB765]

SENATOR ASHFORD: Any questions of Tony? Seeing none, thanks. Proponents of LB765. How many proponents do we have? Okay. And how about opponents? Okay. Good afternoon. [LB765]

JOHN FREUDENBERG: (Exhibit 11) Good afternoon, Mr. Chairperson and committee members. My name is John Freudenberg, F-r-e-u-d-e-n-b-e-r-g. I'm the criminal bureau chief for the Attorney General's Office and I appear in support of LB765. This is part of the Attorney General's legislative package and we appreciate Senator Fulton for sponsoring it. The purpose of this bill is to address the perceived ambiguity of the definition of a gambling device and the misuse of bona fide amusement devices in the state of Nebraska. Now LB765 addresses three specific issues. Number one, it clarifies the definition of a gambling device; two, it creates an exception for a bona fide amusement device and places limitations on the awards they can make; and three, it cleans up a provision previously found unconstitutional. First of all, LB765 modifies 28-1101 by amending the definition of gambling device. This modification addresses the chance versus skill analysis. The bill establishes a line which helps separate illegal gambling devices from proper amusement devices. The determining factor is whether the game is based upon an element of chance or the skill of the operator. A mechanical device which has the capability of awarding something of value through the application of an element of chance is a gambling device. The second change further clarifies what actually is an amusement device. It takes steps to deter their misuse. LB765 states that a gambling device does not include any device or machine where a person stands to win or lose based predominantly on the skill of the operator. These are games like Pop-A-Shot basketball games or the various crane games. Also this would be like application to the Chuck E. Cheese situation. Further, there are limitations on the awards which can be made for these amusement devices. Such awards must be valued at \$10 or less per play and cannot be in the form of cash, alcohol, or tobacco. This provision is aimed at removing the financial incentive for devices which are trying to further gambling interests behind the facade of being a bona fide amusement device. The final change LB765 makes is the removal of a provision previously found unconstitutional. The measure was added to the statute in 1987 and found unconstitutional in 1991. The Supreme Court, in the case of Spire v. Strawberries, Inc., ruled that the proposed stricken portions of 28-1101 and 28-1107 are unconstitutional.

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The court pointed to Article III, Section 24 of the Nebraska Constitution which prohibits the Legislature from authorizing any game of chance involving gambling. LB765 would bring the statutes into conformity with the court-ordered state of the law. I have previously submitted a letter that was given to me by the Nebraska Sheriffs' Association in support of LB765, and I believe that's been distributed to you. Thank you and I'd be happy to try and answer any questions I can. [LB765]

SENATOR ASHFORD: Yes, Senator Rogert. [LB765]

SENATOR ROBERT: Thank you, Chairman Ashford. John, do you think this bill would make machines, like Golden Tee or Big Buck Hunter or those types of things where they have national contests based upon your skill, would be made illegal through this bill? Do you know which ones I'm talking about? [LB765]

JOHN FREUDENBERG: I was not aware of the national contests, but potentially they could. It's a fairly simple analysis: If you pay to play and you have a chance to win on a...win something more than \$10, even if it's a game of skill, it would be illegal. [LB765]

SENATOR ROBERT: Ten dollars per play or \$10...is that what you're talking about, \$10? [LB765]

JOHN FREUDENBERG: Yes, \$10 per play, and they can't be in cash, alcohol, or tobacco. [LB765]

SENATOR ROBERT: So, well, let's say that you get into this system where you're playing, it's about a dollar or two a game and it takes you a couple hours to play at times, so you play 40, 50, 100 games over the course of the time. Would you say that the 100 games that you play you could make it times 10 or that...let's say, because I think they pyramid up to where you get to the top of it and then the top guy can win a certain amount. [LB765]

JOHN FREUDENBERG: I think the potential prize would be the thing that would make the determination. If whatever the top prize...say the top prize for a national competition was \$100,000, that would be a lot of games you would have to play to get that \$10 per play. [LB765]

SENATOR ROBERT: Say it was a couple thousand dollars, and it...could you...would you divide that by the number of games you played? Or say it was this particular game that caused you to win the contest, you won the couple thousand, would that...where it would be divided? [LB765]

JOHN FREUDENBERG: I think you could break it up per play as long as it didn't come over the \$10 per play; however, it couldn't be cash. [LB765]

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SENATOR ROBERT: It could not be cash. [LB765]

JOHN FREUDENBERG: It could not be cash. [LB765]

SENATOR ROBERT: What would it have to be? [LB765]

JOHN FREUDENBERG: It would have to be something that was not cash, not alcohol, and not tobacco. [LB765]

SENATOR ROBERT: Okay. [LB765]

SENATOR ASHFORD: Okay. Yes, Senator Council. [LB765]

SENATOR COUNCIL: And I guess that kind of gets to the question I have in terms of the determination of what is a gaming device. It's like a two tier. First, we say, you know, if it's skill and not chance, skill is not gambling. But that skill gets converted to gambling if the reward for the skill is valued at more than \$10. So even though chance has absolutely nothing to do with the equation, it's the value of the award that now converts a game of skill to a game of chance. Is that correct? [LB765]

JOHN FREUDENBERG: It doesn't convert it from a game of skill to a game of chance. What that award provision that's in there for us for the genre of games that are coming in, they are trying to hide behind the skill definition. And then basically it's gambling, and they are trying to hide behind the skill aspect of the game and give out large rewards, so otherwise, you're making a small bet with the potential of winning a large amount. [LB765]

SENATOR COUNCIL: Okay. I guess that's what I take issue with. I mean, if it's skill, it's skill, it's skill, it's skill. And what converts it to gambling is the amount of the award. So as long as I play this game and it gives me no more than nine bucks back every time I play it, it's skill. But as soon as I take that very same game and as soon as the reward for having good skill exceeds \$10, it becomes gambling. I mean, I have...it's either skill or it's chance. [LB765]

JOHN FREUDENBERG: Your analysis of the bill is correct, Senator. [LB765]

SENATOR COUNCIL: All right. [LB765]

SENATOR ASHFORD: Thank you, Senator Council. Thanks. Seeing no other questions, next proponent. [LB765]

AL RISKOWSKI: Al Riskowski, Nebraska Family Council. Riskowski is R-i-s-k-o-w-s-k-i.

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We're a proponent of this bill, and one of the difficulties we're seeing and I believe I spoke to this committee as well, was in regard to the historic horse racing is a very good example of what you look at in this kind of situation. If you even go on the Internet, as I did, and you look into some of these gaming devices, you'll soon discover that what they're trying to do is replicate as best as they can a slot machine without it being a slot machine. And it becomes harder and harder then to tell the difference between a skill and a chance. On the historic race machines, as a good example, I believe, you can wager two or three times in a minute, and yet they call that skill. It's the same thing with some of these bar machines that are being produced. They call it skill, but the fact is that they're trying to create a very fast slot-machine type of atmosphere so to replicate that excitement. And so if you go and you do investigating a little bit, you'll find that in the machines that's exactly what they're trying to do. They're trying to make it fast. They're trying to make it easy, simple, and with the possibility of even being able to play more than one machine at the same time, and yet they're calling it skill. This bill I believe helps just make a clear demarcation there so that you're not always trying to find where that fine edge is between skill and chance, and make it very clear for the people of Nebraska if in fact we want to bring in slot machines or something of that nature, then we can vote on that. But this makes it very clear. Of course, as Nebraska Family Council, we're very much in behalf of families. We see the devastation that gambling can bring. Of course, anything that's real fast and quick of this nature is very addictive. We see that happening to families, causing real problems. And just a last note: Nebraska voters have voted on this issue a number of times, and I don't think they differentiate between the types of gambling bills that have continually come up. I think they're just voting to say, we don't want expanded gambling in our state and trying to bring in these types of machines is bringing us expanded gambling. We're opposed to that. Thank you, sir. [LB765]

SENATOR ASHFORD: Thanks, Al. Any questions of Al? Senator Council. [LB765]

SENATOR COUNCIL: Mr. Riskowski, obviously I haven't played one of these machines, because I'm not aware of this speed thing. Have you played one of the machines that they're... [LB765]

AL RISKOWSKI: (Laugh) No. [LB765]

SENATOR COUNCIL: ...that's...I mean, I'm just...I'm asking a question, because, okay, I owned a bar and it had these amusement games. And these are not fast games. I mean, you know, the better your skill, the longer play time you get, so I guess I'm...somebody...maybe one of the opponents can describe for me what the actual operation of these machines that are at issue are. But, you know, I'm sitting here thinking, if I go to Septemberfest and go to one of the carnie games and play the carnie game and they give me a prize that's worth more than \$10, I'm gambling. But it's not a machine. I'm just talking about the concept. I'm not talking about the device. I mean,

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let's talk about the concept. The concept is if I engage in a game of skill on this machine that results in a prize to me valued at more than \$10, I'm gambling. But if I take that same skill in and take it out of the virtual context and put it into actual context and get a prize valued at more than \$10, I'm not gambling. Is that your understanding? [LB765]

AL RISKOWSKI: That would be my understanding with this type of legislation. I believe the intent, and perhaps it needs to be looked at, but the intent of this is to help bring some clarification to these look-alike machines that are being brought into the state with the forward or the presentation that it's a game of skill; where, in actuality, like in the case which I know better, the historic horse racing type machine, it's only the last few furlongs of the race, and so it's so fast you can actually wager a number of times in one minute. Now how is that skill? But yet it's being purported as skill. And that's the intent. My understanding of this bill, is to approach some of these type of machines and try and make a clarification so that we're not actually expanding gambling in our state unintentionally. [LB765]

SENATOR COUNCIL: Okay. But one of my concerns is how does the operator or the person who has the machine, you know, distinguish a purely amusement game of skill from what is being presented as being a game of chance in disguise? And that's what I'm talking about. Because I'm going...I don't know what...I have never played whatever game that this legislation is designed to prevent. I've never played the historic horse racing...and that always gets me--historic--and that's like...it should be "recently run." But like I said, as a former bar owner I had these amusement games that are games of skill. And I know some of them, my...the players could open an account in the game and actually be competing at skill levels with other players. You know, I don't know what the ultimate awards were, but I'm going to tell you, honestly, I didn't view that as gambling. But under this bill, if the prize that they received is more than \$10, I'm in violation of this statute. [LB765]

AL RISKOWSKI: Well, Senator, I understand your concern there, and perhaps that's something to be looked at in the bill. I do believe that we need some legislation to better clarify the difference between skill and chance, because some of these games are really playing the edge, so to speak, in that it becomes harder for our Attorney General's Office and other prosecutors to make a clear difference between skill and chance. And like I said, you can go and you can very clearly see their goal is to blur where that line is. They are trying to create games that replicate a slot machine but not be called a slot machine. So actually the owners of the machines are the ones that are creating the problem for us, and we need to somehow make a clarification where that line is. [LB765]

SENATOR ASHFORD: Thank you, Al. [LB765]

AL RISKOWSKI: Thank you. [LB765]

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SENATOR ASHFORD: And I see Senator Christensen has joined us, so welcome to Senator Christensen. I knew he was coming. I said you were earlier and they denied it, but I knew you were coming. Pat. [LB765]

PAT LOONTJER: Good afternoon, Senators. I'm Pat Loontjer. I'm the executive director of Gambling with the Good Life. It's spelled L-o-o-n-t-j-e-r. I live at 2221 South 141 Court, Number 6, in Omaha, Nebraska. And it is a great pleasure to be here today because for the first time in 15 years we're here to support something instead of opposing, and that is a great relief. So we are supporting LB765 because what we've been hearing over the course of 15 years is that there are a number of illegal slot machines that are being used around the state. It's extremely difficult to catch them or to prosecute or to...because the definition is not clear. And these are machines that have no redeeming value as far as the state is concerned because they're not paying any taxes, they're not contributing to the compulsive gambling organizations, and they do nothing except benefit the owners of the machines and possibly the owner of the facility. So I believe that what the Attorney General's purpose is, is to get that definition as clear as possible so that we can prevent this type of gambling from coming into the state. Gambling with the Good Life has been opposed to expanded gambling of what we have and then also of anything new that would come in, and we've been successful for 15 years and the voters have backed us up on that. So in this case I believe that was the intent of the Attorney General was to try to get clarity in some way, shape, or form to be able to shut down or prevent from coming in machines that are definitely Class III gambling and illegal in the state. [LB765]

SENATOR ASHFORD: Any questions of Pat? Yes, Senator Coash has a question. [LB765]

SENATOR COASH: Thank you, Chairman. Good to see you again, Pat. We follow each other from General Affairs and now we're over here. [LB765]

PAT LOONTJER: I'm becoming a groupie. (Laugh) [LB765]

SENATOR COASH: Pat, you mentioned in your testimony these particular games are illegal. I don't think that's the case yet, is that...? [LB765]

PAT LOONTJER: Right. [LB765]

SENATOR COASH: I mean, you mentioned they are illegal, but they are in bars in my district and they're not hiding them. They're out there. I just wanted to make sure the record reflects these are not...these games are not illegal as they stand today. [LB765]

PAT LOONTJER: I believe you're referring to the Bank Shots or something. [LB765]

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SENATOR COASH: Yeah. [LB765]

PAT LOONTJER: I'm not...I'm referring not only to those but to genuine slot machines that are functioning that we have heard that they are functioning in bars in very small towns, and they can be programmed from behind the bar so that if someone comes into that establishment that is not recognized in a small town, a switch can be thrown and they go back to being a game of chance or it's not...or a skill and vice versa. So we've heard of those for years and years and years. Extremely difficult to find and to prosecute and to confiscate. So this would just...I put those in the same category and I realize that the Bank Shots are being litigated at the moment. [LB765]

SENATOR COASH: Right. Okay, thank you. [LB765]

SENATOR LATHROP: Thanks, Pat. [LB765]

PAT LOONTJER: Thank you. [LB765]

SENATOR LATHROP: Next proponent. [LB765]

THOMAS COLPITTS: Good afternoon, Senators. My name is Tom Colpitts, spelled C-o-l-p-i-t-t-s. I'm speaking on a personal note on behalf of myself. I am a compulsive gambler. I have been a compulsive gambler for innumerable years. I am also a convicted felon in the state of Nebraska. My gambling due to slot machines or games of chance caused me to, in my addictive state of mind, break the law. I support this bill because slot machines or games that are chance or skill, there's such a fine line that a definition definitely needs to be made. I think, for Senator Council, I think the games you were talking were more like a video game where it was just you go on, you play, and the more you play the further you go in the game with no real reward. Whereas, these other machines, they could cause someone to become addicted to them to the point where they're not just trying to get that initial, ooh, I'm good at this game, I'm going...I can quit. It causes...for me, when I first started, it was that, ooh, I won a couple bucks, and I'd leave and a couple days later I'd go back and try again and then win a little more. But then as I kept going back, I kept chasing that win, trying to feel that exhilaration. And I put myself in a financial situation in a matter of six months to the tune of \$150,000, and I don't think that anyone in the state of Nebraska would want to see that happen to anyone that they know. I struggle with the fact that, you know, people look at me like, well, you know, he's a nice looking guy, he does well at work; how could he cause \$150,000 worth of damage? It's very easy in a matter of months. So I would really think that this needs to be in. Whether the definition is changed here or there, there definitely needs to be some kind of definition for these games because it could cause a lot of damage. There was somebody that said that there was \$300 million given to the state in revenue from keno and things like that. Well, how much money was actually spent so the state could get that \$300 million? And that's all I have. Thank you. [LB765]

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SENATOR LATHROP: Very good. Any questions? [LB765]

SENATOR COUNCIL: I do. [LB765]

SENATOR LATHROP: Senator Council. [LB765]

SENATOR COUNCIL: And I want to thank you for your very candid testimony. But, see, you have to educate me because what you just told me I'm having difficulty understanding because I don't know. What kind of rewards, what kind of prizes can you obtain on these things? [LB765]

THOMAS COLPITTS: Well, if you...I'm going to go from my personal experience, okay? [LB765]

SENATOR COUNCIL: Okay. I mean, I'm serious. I just...I don't know. [LB765]

THOMAS COLPITTS: When I was a kid I could take a quarter and put it in a machine called, like, Missile Command. I don't know if you all know what that game was. Had a little ball, and you try to keep the missiles from blowing up your bases, okay? So the better you were at that game, the farther you could progress. Whereas, a slot machine, I put a quarter in and I'm trying to get something out of it. I'm trying to make that quarter go farther. So if I put a \$20 bill in this machine, I'm trying to make that \$20 worth more than what it actually is, so I keep pushing the button, hoping that the correct combination is going to come up, like 7-7-7, so that I can get whatever prizes for that. [LB765]

SENATOR COUNCIL: Oh, okay. But not...I understand that. I mean, I know what a slot machine looks like. [LB765]

THOMAS COLPITTS: Okay. So these...from my... [LB765]

SENATOR COUNCIL: And I'm talking about these other ones. I know what a slot...I mean, I know the lure of... [LB765]

THOMAS COLPITTS: From my understanding, these machines are being designed to act like a slot machine to where it's triggering the same endorphins in the brain of the person who's playing it, so that the more they play this game they might be more apt to not just play that game. They might go someplace else such as one of the casinos in Iowa and play those machines and hope that...because they might be good at this game, they can go over there and think the same thing. I would say that the definition definitely needs to be, you know, hey, we don't want this particular type of machine, whether you're masking it as a game of skill or a game of chance. The definition of

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gambling is making or placing a wager with the hopes of getting something more in return, whether it's a teddy bear or I'm going to bet a...you know, kids playing Texas Hold Em now. You know, they do it in the mom and dad's basement, and they're betting, you know, Pringles chips or, you know, pieces of candy. It's still a form of gambling. It's a game of chance. You're trying to get more for a little bit. [LB765]

SENATOR COUNCIL: You've clarified. You've clarified because I was thinking that you were, when you related, you know, the amount of money that you went through in a matter of months, that you were saying that that occurred on these machines that for purposes of this discussion are games of chance designed as games of skill. But you were talking about slot machines. Okay, I gotcha. Thank you. [LB765]

THOMAS COLPITTS: Good. [LB765]

SENATOR LATHROP: I do want to ask you a question because I don't really understand,... [LB765]

THOMAS COLPITTS: Yes, sir. [LB765]

SENATOR LATHROP: ...and I practice law and I've seen a lot of people with problems with drugs and alcohol, but I've never really understood the gambling. You mentioned the machines when you were a kid. You get the same thing out of that if you're doing the Nintendos and the things like that? Or do you have to...does there have to be something in it? [LB765]

THOMAS COLPITTS: There has to be a risk. I mean, you're...and for me personally it was I knew that if I could take a dollar and make \$20, that gave me that natural high. I don't know if you know the... [LB765]

SENATOR LATHROP: I don't. [LB765]

THOMAS COLPITTS: If you look at an addictive... [LB765]

SENATOR LATHROP: And I don't want to tie this place up. [LB765]

THOMAS COLPITTS: Right. I'm going to be real quick. An alcoholic, a drug addict, and a gambler: If you look at three of those people, they're going to look totally different when you take a PET scan of their brain. But if I trigger the alcoholic by putting a bottle of beer in front of him and a drug addict with a needle and a gambler with some poker chips, all their brains are going to look exactly the same. So it's...if that answers your... [LB765]

SENATOR LATHROP: But you don't get it from just doing videos. [LB765]

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THOMAS COLPITTS: No. I think that's a different... [LB765]

SENATOR LATHROP: It's the money. [LB765]

THOMAS COLPITTS: It's the money thing. Right. [LB765]

SENATOR LATHROP: Okay. [LB765]

THOMAS COLPITTS: Yes, sir. [LB765]

SENATOR LATHROP: All right. Any other questions after my little sidetrack? Thanks for coming here. We do appreciate your testimony and it's been helpful. Any other proponents that wish to testify? [LB765]

MARK BONKIEWICZ: Good afternoon, Senators. My name is Mark Bonkiewicz. I was born and raised in Sidney, Nebraska, in the southern part of the Panhandle. I now live in Omaha, Nebraska, near 108th and Q Street, 68137. Last name is Bonkiewicz, B-o-n-k-i-e-w-i-c-z. I'm a self-employed business consultant. I have four major points that I would like to make in favor of LB765. Number one is a quote from Warren Buffett from his May 2007 annual meeting of Berkshire Hathaway, "Gambling is a tax on ignorance. It is reprehensible for governments to promote it." Charlie Munger said, "There's a lot of injury done by casinos." Point two: The citizens of Nebraska have said no to expanded gambling for 15 years. So how many times do the people of Nebraska have to stand up and say we don't want it? Point three: Any time you have gambling, you're going to have the ABC's of gambling, which is addiction--and that's what the young man just spoke about, the previous testifier. That leads to bankruptcy; bankruptcy leads to crime. And with crime you have the two D's, which is divorce and the destruction of families. So I would just like to quote from an Omaha World-Herald article from February 14 of last year, and it's about a young lady who I happen to know well. She's a member of my church in southwest Omaha who was accused of embezzling more than \$56,000 from two small businesses in the metro area. She allegedly owes more than \$243,000 to the Council Bluffs casinos. What you're talking about is feeding the fuel, the addiction that causes people to have challenges, and it destroys families. The second major one that I'd like to quote from is a World-Herald article from May 19 of last year. And we talk about Mr. Watanabe from Omaha, okay? Seventy million dollars worth of casino debts in Vegas. Now you take all the people in this room added together our whole lifetimes, might not make \$70 million. That's how big that number is. So it's the state's responsibility to protect the citizens from behavior that's really going to cause a lot of problems. McCook Daily Gazette, my last quote, October 7, 2009, "We were amazed to hear Monday that Nebraskans are racking up an average gambling debt of \$26,722 according to an annual report from the Nebraska Gamblers Assistance Program of the Department of Health and Human Services." You can do great things for

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the citizens of the state of Nebraska. They have voted several times. They said no, we don't want anymore. Please make that definition tight. [LB765]

SENATOR ASHFORD: Thanks, Mark. [LB765]

MARK BONKIEWICZ: Any questions, I'd be glad to answer them. [LB765]

SENATOR ASHFORD: Any questions of Mark? Thanks. Do we have any other...I'll tell you what we're going to do. We're going to move to the opponents now, and we'll go 30 minutes. We've done 30 minutes for the proponents so we'll go 30 minutes for the opponents. Opponents. Walt. [LB765]

WALT RADCLIFFE: Thank you, Senator. Senator Ashford and members of the Judiciary Committee, my name is Walter Radcliffe, R-a-d-c-l-i-f-f-e. I'm appearing before you today as a registered lobbyist on behalf of Nebraska Technical Services in opposition to LB765. Nebraska Technical Services is an amusement company operator. They've been in business for several decades in Omaha. They distribute a number...and operate, rather, a number of different types of machines: pinballs, pool tables, dart games. I have some people here that will testify on that. I want to make two points about the bill that you have before you. Nebraska, as far as gambling devices and amusement devices, there's always been a bright line--very, very bright line--and that is: a game of chance, a game of skill. That simple. In fact, the line is so bright in Nebraska that the Nebraska Supreme Court has held poker to be a game of chance. So I guess you can throw away a pair of aces, and it's just chance that you did and not stupidity. However, what LB765 does is it changes that rule. It changes that rule when there's a case pending in Lancaster County on some particular machines where the determining factor is whether or not it's a game of skill or a game of chance. If I came to this committee with a bill like that to change the rules to go the other way, I think it would probably be dead before I got out that door. So that's the first thing: Don't change the rule--game of skill, game of chance--in the middle of the game, no pun intended. Let the courts decide. That's who shines the bright light--the courts--based upon the evidence that's presented as to whether or not something is a game of a skill or a game of chance. Now my second point is originally I thought this bill was just overdrafted; that they were trying to catch some of the games that are being litigated, and in the process drug in everything else. Well, obviously, from the testimony today, that's not true. I wish I could just play Senator Council's testimony back. Basically it says if you can win more than ten bucks, it's gambling. It's gambling. So we'll hear from the people that have dart tournaments and bowling tournaments, and ask yourself--that's been going on for a long, long time--ask yourself what harm has come from that amusement. LB765 does not deserve to get out of this committee and I'd appreciate the committee indefinitely postponing it. Be happy to answer any questions. [LB765]

SENATOR ASHFORD: Any questions of Walt? Seeing none, thanks, Walt. Or Senator

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Coash. Sorry. [LB765]

SENATOR COASH: Thank you, Chairman. Walt, do you...the litigation you mentioned in Lancaster County, can you give us any sense as to where we are with that? Like are we going to...were we going to hear from them before we adjourn or are we...? [LB765]

WALT RADCLIFFE: If you can...Senator, I'm even a lawyer some would say in that I passed the bar, and I certainly...I can't guess when the court is going to rule on something. I think we're still in some discovery. Frankly, the pretrial discovery is probably going to--I'm just guessing now--I think that's going to really amount to a lot of the evidence. I don't know how much evidence is actually going to be taken in open court. So I don't...do I think you're going to find out between now and April 15? I doubt it. I really do. [LB765]

SENATOR COASH: But we will. The court will rule at some point. [LB765]

WALT RADCLIFFE: The court, yeah. And, in fact, the Attorney General wrote a letter that said, hey, these machines that we're questioning, I'm going to allow the machines to stay in play, 400 and however many of them, until this is litigated. And then he comes in and tries to change...I don't get it. Well, I get it, but that's not right. If I did it, you'd kick me--and you should. And that's what you should do with this bill. [LB765]

SENATOR ASHFORD: Okay. Thanks, Walt. [LB765]

WALT RADCLIFFE: Thank you. [LB765]

SENATOR ASHFORD: Any other opponents to this bill? Why don't the other opponents come up to the front of the room so that we can move right along. As you're testifying, try not to be redundant. Try to--if you have new information, great--so that we can keep things moving along. Okay. [LB765]

RYAN KRUSE: Good afternoon, Senators. My name is Ryan Kruse, K-r-u-s-e. I'm speaking today as an opponent of LB765. I represent Nebraska Technical Services out of Omaha. We're a 30-year-old amusement device company. We own and operate close to 4,000 machines over quite a large area. The machines I'm speaking of are skill games: electronic darts, pool tables, video golf, video bowling. And on the vast majority, probably in the neighborhood of 70-80 percent of these games we run tournaments, promotions, contests on a monthly basis to give longer life to the games; drive customers, obviously not to just create revenue, but to keep our customers; hence, the bar owners, etcetera, keep their customers spending money at their location as well. In addition, we have almost 40 employees at our company. Almost half of them are directly or indirectly involved in the promotion or administration of those leagues and tournaments. So the implications of this particular bill go much farther, I think, than

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maybe the design, to where many activities, many devices, many games that customers--many people in this room--enjoy and have fun with would be drastically, drastically affected. We run one of the largest electronic dart leagues in the country, and to make something like that work takes a lot of time and energy. And without that, businesses like ours would be in quite a bit of jeopardy. So I hope I shed a little bit of light on the implications of the bill. If you have any questions, I'll be glad to answer them, but I do appreciate your time. [LB765]

SENATOR ASHFORD: Any questions of this witness? I see none. Yes, Senator Christensen. [LB765]

SENATOR CHRISTENSEN: Thank you, Chairman. Explain, like on your video darts, you're talking...it's video darts or it's...? [LB765]

RYAN KRUSE: Electronic soft darts. [LB765]

SENATOR CHRISTENSEN: Electronic soft darts. How does this bill affect that? [LB765]

RYAN KRUSE: Well, with the...the leagues that we run are based on...or I should say at the end of the league there's a payout on it revolving, much like there would be with bowling. I don't know if softball does it or not. But basically it would pay along the way, and then, based on how much they won, there would be a payout. In addition, we run tournaments that conclude each league in many, many different divisions, which may constitute 50, 60 tournaments a year or more, in which there's payouts based on their placement at the end of the tournament, all of which would be based on they would pay to play and get money back based on the results. [LB765]

SENATOR CHRISTENSEN: Okay. Thank you. [LB765]

SENATOR ASHFORD: And the bar pays out, is that what happens? [LB765]

RYAN KRUSE: No. We do. [LB765]

SENATOR ASHFORD: You do. Okay. Through the bar owner? [LB765]

RYAN KRUSE: Well, maybe in conjunction with, but most of that comes from the revenue generated from the machines. [LB765]

SENATOR ASHFORD: Okay. All right. Senator Lathrop. [LB765]

SENATOR LATHROP: None of these machines pay like a slot machine would, where if you win money falls out. Right? [LB765]

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RYAN KRUSE: No, they would not pay that way. No. [LB765]

SENATOR LATHROP: Do any of your games reward somebody with more games? [LB765]

RYAN KRUSE: I'm sorry. Like in terms of credits? [LB765]

SENATOR LATHROP: I understand a pool table. You put the money in, you play the game, and it's over, right? And the darts are the same way. But do you have any machines that you guys have that pay out something other than free games? [LB765]

RYAN KRUSE: Are you referring to the Bank Shot game? [LB765]

SENATOR LATHROP: Well, I don't play these things so I'm trying to understand what they are. Pinball machines, stuff like that. [LB765]

RYAN KRUSE: Oh, a pinball we'll give a free game. [LB765]

SENATOR LATHROP: That's...there's no problem with that. This bill doesn't address that. [LB765]

RYAN KRUSE: It shouldn't because the game would be less than \$10. [LB765]

SENATOR LATHROP: Okay. Tell me what this Bank Shot game is. Can you describe it? If it's in the middle of a controversy, I don't even know what it is. It's not where you sit there and throw the basketball into the thing, is it? [LB765]

RYAN KRUSE: No. I'll be honest with you, I think there's probably going to be another opponent that could better do that for you. [LB765]

SENATOR LATHROP: Okay. Okay. [LB765]

RYAN KRUSE: I'd be glad to but I think you'd be better served with another representative here. [LB765]

SENATOR ASHFORD: Thank you, Mr. Kruse. [LB765]

RYAN KRUSE: You're welcome. Thank you. [LB765]

SENATOR ASHFORD: Next opponent to the bill. [LB765]

LUCINDA KUEHN: Hello. My name is Lucinda Kuehn; it's L-u-c-i-n-d-a K-u-e-h-n. I am a small bar owner and have been for almost 25 years in Omaha. The mainstay of us small

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owners are our darts and our pool league. The way this bill is set up it would not make it worthwhile for these people to come in for 12 or 14 weeks to play this league and then at the end receive \$10. Some of us only get back \$10, some people get back \$50, but it's based on how many games they won and by their skill of being able to play the game and beat their opponents. There was never any money put up before the leagues, as for pool tournaments. The bar owners pay a sponsorship fee which helps, in turn, put back this money to the players. Without these dart leagues and our pool leagues, I think you'll see a lot of us smaller businesses go down underneath because they are the mainstay of their business. They are guaranteed business every single week that they play there. And that's all I have to say. [LB765]

SENATOR ASHFORD: Senator Council. [LB765]

SENATOR COUNCIL: Yes. Thank you, Senator Ashford. And thank you for your testimony because that was one of the questions that I was going to ask, because the way the bill is drafted it talks about a device, and the dart machines are a device--a coin-operated device, in fact. And I had a team, a badly playing team, in the citywide tournament where they go from bar to bar. And that's what you're talking about. [LB765]

LUCINDA KUEHN: Yes. [LB765]

SENATOR COUNCIL: And it's based upon their cumulative scores, and then they get prizes at the end but it's actually tied to the scores they receive on that device, on the board. [LB765]

LUCINDA KUEHN: Whether they win or lose the game. [LB765]

SENATOR COUNCIL: Right. Okay. Thank you. And your concern is that it would...that this bill could be construed as applying to that game as well. That's your concern. [LB765]

LUCINDA KUEHN: Well, in darts and pool if you're going to include this into this bill, why would I, as a person who loved to play for the 14 weeks--because that's how long league is versus 30 weeks for bowling or what other division--why would I want to come back? I don't...for me, personally, I don't play it for the money because I'm not that great of a player. I play it because it gets me out around the city. I get to "camarade" with other people. They get to come to my business; I get to go to theirs. But as far as using the dart boards as a gambling device, we put our fees in for league fees. We are not putting it in to gamble with. I just don't see where the leagues of pool and darts should be included in this at all. [LB765]

SENATOR COUNCIL: Okay. And that's what I'm saying is that your concern is that the bill would make that activity illegal... [LB765]

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LUCINDA KUEHN: Yes. [LB765]

SENATOR COUNCIL: ...and have an effect on your business. [LB765]

LUCINDA KUEHN: Yes. [LB765]

SENATOR COUNCIL: Okay. All right, thank you. [LB765]

SENATOR ASHFORD: Yes, Senator McGill. [LB765]

SENATOR MCGILL: I just want to throw in to clarify Bank Shot, because I did try playing this game in the fall when I was at an establishment that had it, and you know, out of curiosity, since I knew this was an issue we were facing. And what it is, is it's a screen with little pool balls that spin around, and you try to hit them so they all line up with the same number and color, I believe. Hard as hell, if you ask me. I don't know how people win at this game. (Laugh) Sorry for my language, but that's what it is. [LB765]

LUCINDA KUEHN: It is a game of skill. [LB765]

SENATOR MCGILL: In my mind it was very, very difficult... [LB765]

LUCINDA KUEHN: Yes. [LB765]

SENATOR MCGILL: ...and I wanted to share that with the committee who have never played this game before. I did a little research. (Laughter) [LB765]

SENATOR ASHFORD: Thank you, Senator McGill. Thanks, Lucinda, for your comments. [LB765]

LUCINDA KUEHN: Thank you. [LB765]

SENATOR ASHFORD: Next opponents. [LB765]

SENATOR MCGILL: Oh, I think you missed Senator Christensen over there. I think he had a question, but oh well. [LB765]

SENATOR CHRISTENSEN: It's all right. [LB765]

SENATOR ASHFORD: I'm not seeing very well. I'm sorry, Senator Christensen. [LB765]

ANDREW MEIER: Good afternoon, Senators. My name is Andrew Meier, M-e-i-e-r. I'm the owner of Mid Nebraska Coin Op and Bandits sports bar, both located in Grand

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Island, Nebraska. I know my time. I'm not going to take up much of your time here. I've got four quick points I just want to get across, and the first one is: This proposed bill affects many of my businesses. First thing is pool leagues and dart leagues, which these guys have all talked about, so. Our business is built around these services we've offered our customers for years. These services provide extra income for all our bars, restaurants. And we will be one of the only states that will not be able to offer this service. Also many of our games such as Megatouchs, Golden Tees, video bowling, which we've kind of talked about, they offer nationwide tournaments that none of our customers will be able to participate in. The second point is, you know, I just believe this bill is antibusiness. This game was invented in Nebraska, manufactured in Nebraska, distributed in Nebraska, and almost all the games are operated by Nebraska-based companies. The third thing is there's a number of businesses that are dependent on the weekly revenue from our pool leagues, dart leagues, from Bank Shots, and without those they might not survive without the revenue and the customers that these leagues and games generate. My business, personally, the coin-op business, we're probably down about 25 percent. And many of the businesses we work with are down as well. I think by passing this law it would hurt everyone even worse than the way things are right now. The fourth thing is my, what I think, is just let the courts decide on the Bank Shot game this summer. I believe it's going to be the first half of June that they're going to go. From day one, the machines have been tested independently, been presented to the State Patrol and many county attorneys across the state. Nothing has ever been hidden or everything has always been out in the open on these. And just in closing, this law is much bigger than just the Bank Shot game. Don't pass this law just because of one game. This law not only has a huge impact on my business, but for over the 100 people and businesses we've been serving for years. So thank you for your time and... [LB765]

SENATOR ASHFORD: Thanks, Andrew. Any questions of Andrew? Seeing none, thank you, sir. Next opponent. [LB765]

JOHN FOX: My name is John Fox, J-o-h-n F-o-x. My address is 5002 South 39th Street, Omaha, Nebraska 68107. I'm the president of American Amusements, and among other products we're the manufacturer of the game known as Bank Shot. I've heard people today opining as to what our motivation was or my motivation or the out-of-state manufacturer, none of which we are. Our motivation was nothing other than to create a product that was a game of skill offering a good value for both player and location alike, allowing locations to fill a need of revenue, of loss of revenue from a whole host of economic problems. That's all I have to say. Be happy to take questions. [LB765]

SENATOR ASHFORD: Any questions of Mr. Fox? Yes, Senator Council. [LB765]

SENATOR COUNCIL: Yes. Thank you, Mr. Fox. Maybe you can help enlighten me. So

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you manufacture the games here in Nebraska. [LB765]

JOHN FOX: That is correct. [LB765]

SENATOR COUNCIL: And is that same game manufactured by others in other states? [LB765]

JOHN FOX: The game is not manufactured by anyone in any other state. In fact, the intellectual property that is the basis for the game is my own as an individual, and it is the fact that there's a patent pending on the product. There is nothing else quite like it and nor is there any other product in another state or by another manufacturer that I would liken to it. [LB765]

SENATOR COUNCIL: Okay. So there's been some discussion, and I have some printed material that indicates that a person could win up to \$12,000 on a Bank Shot. [LB765]

JOHN FOX: That is correct. [LB765]

SENATOR COUNCIL: Okay. How does that occur? [LB765]

JOHN FOX: It occurs stopping on...it...stopping on an appropriate puzzle at a particular time, solving the puzzle in a particular manner within a particular amount of time. [LB765]

SENATOR COUNCIL: Okay. And it's specific to that machine you're playing. It's not like a progressive situation that you would find in slot machines where you're tied into a system of machines. [LB765]

JOHN FOX: Not entirely. We do take part of the money in from all of the machines and combine it in what we call a prize pool to offer the large prize that you speak of. [LB765]

SENATOR COUNCIL: Okay. But it's not...I mean it doesn't depend upon the play driving up the prize. The prize is set for... [LB765]

JOHN FOX: It is updated every day, daily, based on the number of games played the prior day. [LB765]

SENATOR COUNCIL: All right. [LB765]

JOHN FOX: I hope that... [LB765]

SENATOR ASHFORD: Senator Christensen. [LB765]

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SENATOR CHRISTENSEN: Thank you, Chairman. So basically if it does have that prize pool rolling up, it is kind of like the lottery building it. [LB765]

JOHN FOX: No. I wouldn't...rolling up I don't think is an accurate...it changes every day after 1 a.m. to whatever, based on the number of games played the previous day. It's not like an odometer. [LB765]

SENATOR CHRISTENSEN: But the...if, say, there's a hundred games played today, it's going to add some more value that somebody could obtain at another time. [LB765]

JOHN FOX: That's correct. Or unless somebody wins it before that. [LB765]

SENATOR CHRISTENSEN: So it's not paid off of each individual play then. In other words, if I put in my quarter, I play, I know what I win right now and I'm done. It's more like a lottery ticket. I've got to wait and see how much I'm going to win. [LB765]

JOHN FOX: No. I don't find that (inaudible). [LB765]

SENATOR CHRISTENSEN: If there's an extended growing...either you're done, you've got everything won right now and it's over and done, or if you can win some more in the future then it's a building thing that...to me, they're two different things. Either you come in and throw your money in, you play, take your chance, whatever, and you're done. Or it's like a lottery building thing: The more people play there's a bigger pot and then you're going to find out what you win later. [LB765]

JOHN FOX: Not quite on the same page, Senator. There is no build-up or pyramid. It's won on a single puzzle. And the player has to seek that puzzle and answer that puzzle. The amount of the prize may change from day to day, but what the player has to do to win, that changes not at all. [LB765]

SENATOR CHRISTENSEN: Correct. What he's doing to win doesn't, but the amount he could win or the prize could change. [LB765]

JOHN FOX: Which it would...the amount of the prize could change daily, Senator. [LB765]

SENATOR CHRISTENSEN: So that's just like if I buy a lottery ticket today, the value of the whole lottery might be \$100 million today, but if 2 million more people play it's going to be worth more tomorrow. It seems to me like it's more like that type of...more like a gambling deal than a machine where you play and done. [LB765]

JOHN FOX: No. Senator, no. As Senator McGill said, the game is hard as hell to play and I would accept that analogy. In a lottery, your win is based purely on chance. And in

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the game of Bank Shot, your win is based on your ability to seek, stop, select, strategize in...with time constraints, and all of these factor into whether you're a success or fail. It's not, if you will, luck. Which lottery, of course, is luck. The...I would liken it to if at the Midway at the State Fair, if every day on the balloon toss there was a prize that grew daily. I still have to hit the balloon and pop the balloon. I don't liken it to the lottery at all. [LB765]

SENATOR CHRISTENSEN: I guess I was just asking a question. It's more like, when I was in college Pac-Man was a big deal, and, you know, you'd play in as far as you could, and each day you seen if you could get to additional levels further up, but once you walked away you were done. That was just pure entertainment to me. Whenever I threw four quarters in, my entertainment was done and I went home. You're saying the money will be won by, like, hitting that right balloon, or you know you have left all your money. It's just an accumulating prize. [LB765]

JOHN FOX: Correct. This is also done on, for example, the game of skee ball, which we probably have all played at some time in our life where you roll the ball up the ramp. It's not uncommon for those to have prize pools based on the number of games played, which change daily. Again, you still need the significant skill element in an attempt to obtain that prize. [LB765]

SENATOR CHRISTENSEN: Okay. Thank you. [LB765]

SENATOR ASHFORD: Thank you, Mr. Fox. [LB765]

JOHN FOX: Thank you very much. [LB765]

SENATOR ASHFORD: Thank you. One last witness and then we're going to proceed from there. [LB765]

JAMES LAKEY: Hi. I'm James Lakey from 5110 Troon Drive, Lincoln, Nebraska. I'm a vice president of VVS Incorporated, which is an amusement game company here in Nebraska very similar to the first opponent, NTS. So I won't say the same things that he was saying. Probably my biggest concern is...something we do different is we do business with family entertainment centers--one here in Lincoln, Grand Island, and Kearney--and they're similar to, like, Chuck E. Cheese, Champions Fun Center here in Lincoln, Nebraska. And my big concern in reading this is, you know, putting the limits on what you can win on skilled games. These are called family entertainment centers. They're all over the United States. And I'm here today because I'm very concerned that this could limit what we can do in these games and facilities for family entertainment. We also...I want to touch on one other thing, is we run tournaments on our video games to promote play. And, you know, sometimes those prizes are more than \$10, and it would severely hurt the interest in these games because people like to win something

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when they play. Very similar to golf tournaments, bowling tournaments, there's prizes and prize money that is offered to get people to participate. That's their main goal. They may play in a league all year and then at the end of the year they have a big tournament to really see how good you got during the year. And, yes, there is prizes given for those tournaments. And it's just the competition. It's the American way, in my opinion. People like to compete. It's our livelihood. But again I'm very concerned about what it could do to these family entertainment centers that we deal with, and so if you have any questions I'd be glad to answer them. [LB765]

SENATOR ASHFORD: Any questions? Seeing none, thank you, sir. Do we have any neutral testifiers on this? Is Senator Fulton here to close? I don't see him. [LB765]

SENATOR LATHROP: That was the note. [LB765]

SENATOR ASHFORD: Oh, okay. Oh, he's not? I've got to get back. I won't close. Thank you. I thought it said he might close. Okay. Let's move on to Senator Council. LB1105. [LB765 LB1105]

SENATOR COUNCIL: Ready? [LB1105]

SENATOR ASHFORD: Yes, ma'am. [LB1105]

SENATOR COUNCIL: Senator Ashford and fellow members of the Judiciary Committee, I'm Brenda Council, the senator representing the 11th Legislative District, and I appear before you this afternoon for the purpose of introducing LB1105. As the committee well knows, I introduced LB306 during the last session. LB306 provided for the repeal of the death penalty and the imposition of a sentence of life imprisonment without possibility of parole in lieu thereof. This committee voted to advance LB306 to General File, notwithstanding the fact that the bill substituting lethal injection for electrocution was also advanced. LB306 did not reach the floor for debate until the start of this session. And when debate on LB306 commenced, there were many questions as to the need to continue to debate the death penalty since the body had spoken last session on LB36. While admittedly there has been considerable debate over the years on the moral questions the death penalty evokes, the question of whether it serves a deterrent purpose and whether the death penalty has a proper role in the administration of justice, the fact remains that the death penalty is a matter of public policy. However, as with any matter of public policy, questions must be raised as to whether the policy is a sensible use of taxpayer dollars. It is the aim of LB1105 to set aside the emotions, and focus on getting a handle on the financial cost of capital punishment in this state. In these times of painful budget cuts, there is no reason that the death penalty should be immune from consideration. Indeed, I had the privilege of attending a preconference on sentencing and recidivism in December that was sponsored by the National Conference of State Legislatures, an organization that this Legislature is a member of and in which

we actively participate. One of the topics of discussion during the preconference was the need for states to consider the costs of corrections while they're considering their budgets and cuts in spending. Included in those considerations of corrections costs was the cost of maintaining the death penalty. In fact, one of the keynote speakers emphasized the need for states to examine these costs in these economic times by stating that a crisis is a terrible thing to waste. And what he meant by that was that this financial situation that states find themselves in presents the perfect opportunity to thoroughly examine all of its costs, and particularly the cost of the death penalty. Clearly, our current revenue shortfalls and the looming budget deficits present a problem of crisis proportions for the state of Nebraska that requires a dispassionate analysis of the costs of the death penalty. As I have noted, other states facing budget deficits have undertaken such a cost analysis of the death penalty. And if you will briefly allow me to share with you, one of those states is the state of Kansas. And the state of Kansas had several representatives at this preconference in December and spoke at great length about its state's consideration of its correctional costs and particularly its cost of maintaining the death penalty. In December of 2003, the state of Kansas conducted a legislative audit where they estimated that the median costs of a case in which the death penalty was given was \$1.2 million compared to the same estimated costs for a non-death-penalty case of about \$740,000. In fact, there were comparisons of two cases involving homicides, two victims. One was Romane Douglas was convicted of killing two people. He received a life prison sentence with no chance of parole. If Douglas lives to be 79, the average life expectancy for an American male, the state projected that they will have spent \$243,884 to convict him, deal with his appeals, and keep him in prison. Compare this to Gavin Scott who was also convicted of killing two people in 1996. He received the death sentence, which was overturned on appeal. He is set to face another capital punishment sentencing before a jury in July of this year. So far, the state has spent \$750,074 to pursue the death penalty case against Scott, and those numbers do not include the cost of incarceration. In Texas, a death penalty case costs taxpayers an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years. California, who we oftentimes don't want to compare ourselves to unless it suits our purposes, in Los Angeles County the total cost of sentencing someone to death is over \$2 million, 31 percent greater than the \$1.5 million it costs to sentence someone to life in prison without the possibility of parole. The \$1.5 million includes \$627,000 for the cost of the trial and \$821,000 for imprisonment for the remainder of the individual's natural life. Finally, in terms of comparisons, the Washington Death Penalty Assistance Center conducted a review of capital cases from 1999 to 2003 that estimated that a death penalty trial costs more than double the amount spent on non-death-penalty trial. The report found that Washington State counties sought nearly \$35 million from a state fund established under the Extraordinary Criminal Justice Cost Act that was adopted by the state of Washington in 1999 to alleviate some of the burden on county budgets of prosecuting death penalty cases. We as a body talk often about transparency and accountability, yet we are willing to exempt the death penalty from these standards. I

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am fairly confident that during these tough economic times this body is not going to approve a program that has no clear benefit if the cost of implementation or the cost of continuation is enormously expensive. In fact, in the first few weeks of this session, this body did not advance a bill that would better equip school personnel to deal with children with asthma and other types of attacks, clearly a beneficial purpose, but we didn't approve that principally because of the small amount required to be expended to carry out the intent of the bill, which gets me to the substance of LB1105 and specifically the associated fiscal note. As you may recall, LB1105 was originally introduced in the form of an amendment to LB306 at the beginning of this session. One of the reasons the amendment failed, and I thereafter indefinitely postponed LB306, was the issue of a study that had not been the benefit of a hearing. In order to provide for the opportunity for such a hearing during this legislative session, I simply introduced the amendment as a stand-alone bill, fully aware of the need to refine the content of the bill. I had a very short time frame. I had to submit the bill within the ten days--and I think, in fact, the day that LB306 was scheduled for hearing was the last day or the next to the last day to submit bills. So I simply took the amendment in the form that it had been introduced as an amendment to LB306, had it prepared as a bill, and it's LB1105. So when the bill was introduced, it was introduced with the full understanding that it was going to need additional amendment and refinement. And let me point a couple of those out. First and foremost, the bill provides that the study is to be conducted by the State Auditor. The Auditor was identified in LB1105 because some of the studies that have been conducted in other states had been conducted by their state auditor or their state treasurer. After talking to some members of academia as well as a very thorough and meaningful conversation with our State Auditor, Mike Foley, it became clear that the study should not be conducted by the State Auditor. According to Mr. Foley, one of the reasons LB1105 has a \$400,000 fiscal note is because they do not have personnel with the skills and ability to carry out this study and that they would have to hire individuals to carry out the study. As I indicated, I have talked to members of academia who have participated in performing studies like this. The committee will remember that last year when we were debating the death penalty the committee had hired an intern who he, himself, has the ability to conduct a study of the costs, so the bill will be amended by substituting the appropriate entity to conduct the study. It is anticipated that the cost of that study would be far less than \$400,000, and, in fact, would be far less than \$100,000. Second, the bill needs to be amended to provide that the study will encompass a comparison of the cost of a death penalty case versus the cost of a sentence of life without possibility of parole to achieve an accurate analysis. If you read the bill as it is currently drafted, it just simply provides for the collection of data regarding the cost of administration of the death penalty. What we need to see is a comparison of the costs of the death penalty versus the costs of sentencing someone to life without possibility of parole. I'm sure that there are both proponents and opponents who are prepared to come forward and testify. I certainly appreciate some of the concerns that have been expressed, particularly by the Nebraska Association of County Officials. And their concern is that the bill currently states that the study would look at the costs of the

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death penalty for the last 25 years, and is a legitimate concern that records going back 25 years may not be available. So recognizing that, there would be an appropriate amendment that would allow us to have meaningful data for a meaningful period of time without placing the county officials at a particular disadvantage. And with that, I'll answer any questions that the committee may have. [LB1105]

SENATOR ASHFORD: Yes, Senator Christensen. [LB1105]

SENATOR CHRISTENSEN: Thank you, Chairman. Senator Council, did I understand correct your intent is to not only see what the cost of death penalty and all the appeals are, but life without sentence and all the appeals? [LB1105]

SENATOR COUNCIL: Yeah, life without possibility of parole, so that you can do a meaningful comparison that just based upon the studies that have been conducted by other states a sentence of life without possibility of parole is far less costly than a sentence of death. And so the study would look at what it would have cost the state for those where we have data on death penalty cases that have been tried, and to completion, what that would cost compared to what cases where the sentence that was being sought was life without possibility of parole. [LB1105]

SENATOR CHRISTENSEN: Okay, thank you. [LB1105]

SENATOR ASHFORD: Thank you, Senator Council. And this is your...I'm sorry, Senator. I'm sorry, Senator Coash. [LB1105]

SENATOR COASH: That's okay, Chairman. Senator Council, I just...you may have stated this but I didn't catch it. We're taking the Auditor out of it. [LB1105]

SENATOR COUNCIL: Yes. [LB1105]

SENATOR COASH: And you mentioned talking with academia, but you haven't identified... [LB1105]

SENATOR COUNCIL: No. [LB1105]

SENATOR COASH: ...a source at this point that you'll amend into this. Is that...? [LB1105]

SENATOR COUNCIL: No. And, in fact, we're trying to get the best estimate of the cost from various academic research before we put "who" in the bill, because we want the who to correspond to the cost. [LB1105]

SENATOR COASH: Okay. My concern would be, whoever it is, I think as impartial as

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we can make them the better results we'll get from this. [LB1105]

SENATOR COUNCIL: Oh, absolutely. And that's, quite frankly, Senator Coash, why I was looking to academia. And I will share with the committee, although our discussions have not been finalized, is University of Nebraska at Omaha and their Center on Criminal Policy. And the individual who I've been in discussions with, Mr. Hank Robinson, has appeared before this committee on numerous occasions with regard to a variety of criminal justice issues that we've been presented with. [LB1105]

SENATOR COASH: Thank you. [LB1105]

SENATOR ASHFORD: Thank you, Senator Council. How many proponents do we have of this bill? Okay. Okay. Jim. [LB1105]

JIM CUNNINGHAM: Senator Ashford and members of the committee, good afternoon. My name is Jim Cunningham, it's C-u-n-n-i-n-g-h-a-m. I'm testifying in my capacity as executive director of the Nebraska Catholic Bishops Conference in support of LB1105, the concept of LB1105, having heard that Senator Council does have some plans to modify the bill. From our perspective, and this probably will come as no surprise to this committee because I've testified numerous times in opposition to continuation of the death penalty, but at this point in the history of capital punishment in Nebraska it certainly seems that getting a good handle on the costs of the death penalty is a reasonable, responsible, and commonsense action to take, for there are legitimate and serious questions about, first of all, economic drain; second of all, the cost effectiveness of continuing to hang onto the death penalty in order to have the ability to dispense the ultimate retribution once every 16 years or whatever that average is now. And also I think that there is a legitimate and responsible question in perhaps being able to gain a better assessment of the extent to which continuing the death penalty is impeding progress in pursuing more effective responses to crime and violence in the state. I think back on the debate that took place on LB306, and I recall that one of the responses to the proposal of a cost study was that it makes no difference; it wouldn't matter. When I heard that, it seemed to me that the nature of that response is, well, the sky's the limit. And one thing I think that we could all testify to is that you never hear sky's the limit on spending for more effective law enforcement or for improving the correctional system or for solving cold cases or for compensating victims and their families or for any other number of human services programs designed to address the root causes of crime and violence. And I think that the proposal to assess and study the costs of the death penalty would enhance the Legislature's ability to consider those other issues as well. Thank you. [LB1105]

SENATOR ASHFORD: Thank you, Jim. [LB1105]

SENATOR LATHROP: Maybe your best effort yet. That was... [LB1105]

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SENATOR ASHFORD: I was going to say, why don't you run for the Legislature?
[LB1105]

SENATOR LATHROP: You were right on the money. Thank you. [LB1105]

JIM CUNNINGHAM: Thank you. My least prepared effort I would have to say. [LB1105]

SENATOR LATHROP: Yet you did well. Thanks, Jim. [LB1105]

JIM CUNNINGHAM: Thank you. [LB1105]

SENATOR ASHFORD: Thank you, Jim, for your comments. Okay, let's go over here to some familiar faces. [LB1105]

KURT MESNER: I'm Kurt Mesner, M-e-s-n-e-r. I'd encourage all of you to support LB1105. I know from personal experience the costs of the death penalty cannot be measured in dollars. Looking at the monetary cost is a step in the right direction to rid our state of a bad law. I am more concerned about the cost to murder victims' family members like myself. The death penalty added 20 years of unnecessary grief and suffering to my family and I. If my sister's killer had been given life imprisonment from the start, we could have gone on with our lives. Instead, we had to hear and read about the murder for many, many more years because of all the necessary appeals. A small amount of money saved could be used to provide services for murder victims' family members that is badly lacking and is needed. Also the money saved could be used to put more resources into solving the many unsolved murders that have happened and give all murder victims' families justice they deserve. Thank you for listening to me.
[LB1105]

SENATOR ASHFORD: Thank you. Thanks for your comments. Seeing no questions, thanks for coming back. [LB1105]

MIRIAM KELLE: (Exhibit 12) Good afternoon, legislators. My name is Miriam Thimm Kelle, M-i-r-i-a-m T-h-i-m-m K-e-l-l-e. I come in support of LB1105. I worked last night as a night nurse at the Beatrice State Developmental Center. I've also worked nights at Tecumseh Correctional Institute in the same capacity. I know how the state is in a need of accounting of every penny. I try to be conscious of my time and electricity and inventory as I do my work. I want the Legislature to do the same thing by being aware of the costs in every aspect of the state's work. I understand some of us do not agree on the death penalty. But today it is a cost issue. We cannot close a blind eye to any of the state's work. I understand the emotional cost of the death penalty all too well. But I'm sure many aspects of how Michael Ryan's family feel are lost to me. I do remember the mother's look of sympathy to us at the sentencing. The sadness of her eyes cut across

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the courtroom. I was the mother of a one-year-old little boy at that time. I bet she remembers Michael as a small child and wonders where she went wrong. Mothers always blame themselves--what could she have done? What could any of us have done? As we attack the subject of the state budget, I wonder why our state doesn't have the 4 micron MRI scanner. This has the ability to read hot spots in the brain in areas of schizophrenic and manic depression illness. Did you know that a part actually dies in your brain with the posttraumatic stress disorder? How much money are we spending on how to kill people? Why are we not spending money for prevention? America has made so many strides in healthcare for heart disease, but what have we done with mental illness? Schizophrenia is a disease that lies in my genes. When some of the heirs of mine develop paranoid schizophrenia, will we be discussing how to kill them? Will we be treating them proactively or will we just what's to prevent the horrible crimes that suffer from those disease are able to do? Since my brother's terrible death, how have we become proactive with mental illness? I ask myself, are we hiding them at the end of the hall so to speak? In nursing school we discussed the hopeless cases and how easy it is to put them...put the malignant cancer at the end of the hall and avoid it. We now have the wonderful hospice nurses and discuss the needs of the dying. My goal last year was to get people to quit saying "the worst of the worst." They all have names. This year I hope to find the true cost of the death penalty so we can make rational decisions in these tough economic times. Please tell me we are moving toward an answer and not simply opposing each other. Thank you. [LB1105]

SENATOR ASHFORD: Thank you, Miriam. Are there any questions of Miriam? Thanks for coming back again. [LB1105]

MIRIAM KELLE: Thank you. [LB1105]

SENATOR ASHFORD: Let's see, where are we on the proponents? Any other proponents? Opponents? Joe. [LB1105]

JOSEPH SMITH: I'm Joe Smith, Madison County Attorney. The County Attorneys Association had asked me to come down and talk to you all, and it looks like I'm the only one they asked. And I know I've talked to you all before about death penalty, you know, the good and bad and the pros and cons. And I understand this is more of an economic thing, and I'll restrict it to that obviously. But there are four things that I looked at the bill and saw just briefly. And I understand Senator Council has talked about not going back 25 years, but even before you go back, you have some costs that are easy to ascertain. Those are the ones that go to the commissioners, you know, the attorney bills, mileage, jury fees, those type of things. The cost of how much time you spend in your office, I don't think anybody keeps track of that. I know the public defenders don't, and I know that over 25 years, or 10 years, public defenders and county attorneys change. There's no way, for example, I could guess what my predecessor would have spent on a homicide case, and that would be a tremendous burden. And the other thing is, my

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second point is, and I agree with Senator Council and I saw that in the bill, that if you really want to have a meaningful analysis of what a death penalty costs, you have to look at what the other options cost, and that would be what a life sentence costs and what a life sentence without parole costs. Keep in mind that a life sentence without parole is hypothetical in Nebraska, at least, because it doesn't exist. So you have that. But if you have right now, and I heard earlier that the fiscal note was \$430,000. If you recognize that it takes a lot of work to get the cost on a homicide case and you have the life sentences case, you know, there has got to be at least ten life sentences for every death sentence. So the same analysis you go through on a death sentence, that is how much time you spent, what the fees were, all those type of things you would have to spend, so I don't see by enlarging it would ensure that it would go down. The other thing about economic analysis--and I'll try to hurry, I know I talked to you about last time--if you really want to embrace an economic analysis, you have to by logic embrace all those statistical regression analysis done by economists that would indicate that the death penalty actually saved money or saved lives. And we talked about that last time, but that's an aspect certainly of economic. The last thing I'll speak of, and I understand that the state has a budget to control, but understand also that the lion's share of the cost on any criminal case is borne by the individual counties. There's some cost up here. In Madison County, we had, as you know, three expensive death cases and one expensive life case recently. The state bill would be things like prison and the appeals. But as a whole, you have elected county officials and elected county attorneys making those decisions to seek the death penalty not responsibly based within their own counties after being elected by their constituents. I hurried. [LB1105]

SENATOR ASHFORD: Thank you, Joe. Any questions of Joe? Yes, Senator Coash. [LB1105]

SENATOR COASH: Thank you, Chair. Thanks, Joe. I just wanted to be clear, you're here on behalf of the county attorneys? [LB1105]

JOSEPH SMITH: Yes. They called me. [LB1105]

SENATOR COASH: So the county attorneys are opposed to this. [LB1105]

JOSEPH SMITH: Yes. And I've talked with DeMaris and went through some of her concerns. [LB1105]

SENATOR COASH: Okay. I know I'm putting you on the spot here, but do you think--your experience in prosecuting--do you think it costs more to your county when you have to pursue the death penalty than if you'd chosen not to? [LB1105]

JOSEPH SMITH: Yes. And I talked with Senator Lathrop last time. Death penalties I believe are going to cost more. [LB1105]

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SENATOR COASH: To prosecute. [LB1105]

JOSEPH SMITH: Yeah, but not tremendously more. Keep in mind...and I tried to get some stats on mine. I had three death sentences and one life sentence all went to trial. Gabriel Rodriguez got five life sentences. His bills are not...his cost is not that much less than the other ones. You know, I think what happens in a case, your costs are kind of evidence dependent. Do you have this many witnesses? Do you have this many issues? You have a life and death defendant has the same issues, the costs, at least at the county level, trial level, would be very much the same. [LB1105]

SENATOR COASH: Do you think the county attorneys would be interested in, as well as what Senator Council is proposing here, understanding the difference it costs the counties between prosecuting a crime with the outcome of death penalty versus the same...with the outcome of life without parole? [LB1105]

JOSEPH SMITH: I truly think that on a county analysis on a county basis, because I've been through this and I've been through...constituents, I believe that your constituents, your county officials, when you look at the case and it's a whole...they want justice either one way or the other. If they think it's a death penalty case, they expect the prosecutor to seek it. And I think people have a right to expect the prosecutor is not going to prosecute or not prosecute based on money or how much work it cost. So I think your answer is on a county level I think people believe cost is not important, at least in a homicide case. [LB1105]

SENATOR LATHROP: Joe, I can't hear you. Can you... [LB1105]

JOSEPH SMITH: At least on a county level, the question is on a county level do you think people are interested in how much it costs? Do you think the constituents or the commissioners it makes a difference? And I don't believe on a county level it does, because in my county, 35,000 people, and the people have very strong opinions on most homicide cases what should happen as a whole. We spent a lot of money on three death penalty cases and one life case, and as a whole I think they thought it was appropriate. And I don't think if I would have went before my commissioners or before the press and said this is going to cost three times what it cost, it would have made a difference. I think people would have expected me to do what I did. And I would have. [LB1105]

SENATOR COASH: And you don't think counties, citizens of the counties care how much they're being asked to pay? [LB1105]

JOSEPH SMITH: No, I think they care. I think the people care about how much they pay for garbage, you know, what they pay for electricity. But I think when it comes down to

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dead people on the street, your constituents say: Do something. I don't care what it costs, stop this. And I think that's the analysis. I think it's a duty. It's black and white. [LB1105]

SENATOR ASHFORD: Senator Lathrop. [LB1105]

SENATOR LATHROP: Joe, they might. You might be right, but here's the issue I believe. First of all, let me talk about that we don't have life without parole. These people...no one's getting parole that's doing a life sentence anymore. Am I right? [LB1105]

JOSEPH SMITH: That's right. [LB1105]

SENATOR LATHROP: As a practical matter it's become a political issue, and these guys that sit on the board are not paroling anybody with a life. [LB1105]

JOSEPH SMITH: It takes a change in two elected offices, basically: Governor and Secretary of State. [LB1105]

SENATOR LATHROP: Okay. So as a practical matter, a life sentence is a life sentence. [LB1105]

JOSEPH SMITH: Well, unless we change... [LB1105]

SENATOR LATHROP: The other question, though, and you say that the people don't care--the people of Madison County, for example, don't care. The fact is they don't know what it costs. [LB1105]

JOSEPH SMITH: Well, I think they knew what it costs. If you look at...I got some of my data for today from the Daily News. [LB1105]

SENATOR LATHROP: Okay. [LB1105]

JOSEPH SMITH: I mean, and they know what it costs because they see the trials. [LB1105]

SENATOR LATHROP: They look at what it costs because they think it's going to be imposed some time soon. Here's the thing. I don't know that we can look at the idea of having a study and looking at the costs of the death penalty without also telling the people this is what it costs, and by the way, it happens in x percent of the time. And half the time these guys get off or they're...during an appeal it's reversed. And do you want to keep putting money into it? And every time we have this argument on the floor--because I've made it--every time we have this argument on the floor, the people

on the other side who, you know, the death penalty proponents, stand up and say we don't have any good numbers. You're only speculating, Lathrop. You're trying to take the numbers from a Kansas study or a North Carolina study and translate them, and all the confusion follows. I remember Senator Erdman did it the very first time this subject came up. And they said those numbers don't work. And we can't say that we know what the people want or don't want until we find the information, tell them what the batting average is of the death penalty, and say what do you want. But I think Jim Cunningham made a pretty good point. To say that people are willing to spend unlimited amounts of money on an institution that is doing very poorly in terms of having...taking murderers and killing them as punishment, we could say spend it on MRI machines for the sick or spend it on violence prevention in the hot spots. So I guess I disagree with your suggestion that people don't care because I think they probably do. And they certainly would if we knew what the numbers were and we could compare them to how good is the death penalty doing serving the people of the state. [LB1105]

JOSEPH SMITH: Well, as I pointed out, people have priorities. And I think people as a whole, when they see a case like mine and other cases--not all homicide cases certainly like they had--people expect a certain amount of government intervention. And I realize that death penalty is not perfect. In this case, I had two...one of my cases I had two interlocutory appeals I wasted money on. I had mental retardation claims two years after the trial. A lot of those problems are creatures of statute, not prosecutors or not fiscal issues. [LB1105]

SENATOR LATHROP: But they're creatures of the death penalty case, as is their aggravating, mitigating circumstances. [LB1105]

JOSEPH SMITH: Other states have done very well with...other states have done better, at least, with controlling costs of successive habeas corpus things like that in order to...I know county attorneys have suggested changes for a lot just in the Vehla case. The Supreme Court made a decision that cut some costs. They said that county attorneys now could have independent evaluations on mental retardation. I think the answer is to look at the bill and say, you know, look at the statute as a whole. How do you make this better, not just to get rid of it because that... [LB1105]

SENATOR LATHROP: I think it's interesting that we're also having a national discussion about where we're going to try these terrorists. And I'm not suggesting that they should be tried or that I agree or disagree with where they're being tried. But you hear the people who want to try them in New York City say, it doesn't matter what it costs. And now we're hearing that there's a whole outcry of it's going to cost too much to try them in New York City. And so I think people do care about what the costs are. And we see it certainly at the level of where we're going to try these terrorists at, because the cost, even though it may be the most significant criminal trial in a decade or in a hundred years, cost is becoming a consideration. [LB1105]

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JOSEPH SMITH: Well, I believe, taking the New York example, for an example, that the closer somebody is to a violent homicide as a whole, the more costs...you know, if I'm a victim of a crime and it's my wife or my brother or my sister or my child killed, I'm going to say, you know, I'm entitled to this. My family is entitled to this. If I'm in Kentucky, I may say something else. [LB1105]

SENATOR LATHROP: I...I'm... [LB1105]

JOSEPH SMITH: And keep in mind, you're talking about a county level. On a county level people are closer to the evil that has been done than they are in a county 100 miles away. [LB1105]

SENATOR LATHROP: I certainly agree with that. And I always, always appreciate...we've been friends for a long time and I always enjoy engaging you in these. [LB1105]

JOSEPH SMITH: I'm sorry, Senator. [LB1105]

SENATOR ASHFORD: Yes, Senator Council. [LB1105]

SENATOR COUNCIL: Thank you, Senator Ashford. And thank you, Mr. Smith, for coming today. Number one, we need to correct the record. And Senator Lathrop was correct about the life sentences, that we do, in fact, have life without possibility of parole in this state. There are 24 people who were convicted as juveniles who were sentenced to life without possibility of parole. Hopefully, one of these days, we can eliminate that. But the point that's being made--and Senator Lathrop touched upon it--during the debate on LB306, before LB1105 was introduced as an amendment, there was survey data that was thrown about that 55, 65 percent of Nebraskans favored the death penalty. Well, that's because, in my opinion--and reasonable minds can differ because we haven't provided them with an option to consider--people want closure. And I understand that, and Mr. Mesner testified in his testimony to it. But closure doesn't automatically come with a death penalty sentence. Mr. Cunningham referred to the fact that when something is administered maybe every 16 years, if at all, I don't know how much closure that gives to the families of the victim of a homicide. But I believe that even with as serious a crime as was committed in Norfolk, that if people understood that the...and I vividly recall when you came and testified against repeal of the death penalty, speaking about the \$3 million and the burden that that \$3 million placed upon the taxpayers of Madison County--true, it's not a state tax burden--but it was a tax burden. And you, yourself, admitted that that was a burden on the taxpayers of Madison County. And what I am suggesting, that through this study we can see how best to balance the interests of the residents of the state of Nebraska. And let me make it clear: One of the reasons I have violently opposed the death penalty is because it is state-sanctioned

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vengeance, and we only...we pick and choose who we want that vengeance from. Because I think you know as well as I do, there are 200-plus people serving life sentences in "gen pop" for committing homicides. And I think you know as well as I do that because of the risk of committing an irreversible error by executing someone, that's why we have all of these safeguards that provide for more appeals. Now someone raised the point that if I get sentenced to death, if I'm sentenced to a life sentence, that I'm going to seek it to appeal because I don't want to spend the rest of my life in prison. But I think you would agree that someone sentenced to a life sentence is not going to get the same level and number of appeals that someone who is at risk of having their life terminated. Am I correct? [LB1105]

JOSEPH SMITH: Actually, I don't agree with that. The law is set up so with respect to the appeals the only difference really is that the first appeal is automatic. So everybody gets the same amount of appeals. They have a direct appeal; they have appeal to the Supreme Court over the cert; they have habeas corpus. [LB1105]

SENATOR COUNCIL: But you're more likely to see the federal courts grant repeated habeas corpus petitions for someone who is facing death than someone who is sentenced to life. Am I correct? [LB1105]

JOSEPH SMITH: Well, I really don't know. All the ones that I've seen, I haven't seen that. But I haven't seen any studies that say what percentage get...you know, the habeas corpus I see are things like, you know, condition issues. [LB1105]

SENATOR ASHFORD: Thanks, Joe. Do we have any other testifiers on this bill? The only...the comment that I would make in having been through many, many of these discussions is I do think there is a significant difference between what actually happens on your level--and I fully understand public opinion and how they react to heinous crimes, and certainly Norfolk is one of the most heinous I can recall. And then after that we begin the appeal process because there's always the chance that someone can be sentenced to death who did not commit the crime. And that's been shown over the years that happens once in a while and that there are subsequent changes in a sentence or even an acquittal from time to time. We then make certain in our country, in our jurisprudence, that we don't want that to happen very often. The people that are on death row we want them to actually be the people that committed the crime and so forth and so on. So I think...it seems to me that there is a different analysis here between what happens locally and what you do. Very legitimate considerations go into that. And then look at what happens afterwards may be cause, as you suggest, by the defendant in appealing these cases for a variety of different reasons. The question then becomes, is that not worth it for the one person that may not have committed the crime, like the Texas case that we've heard? I mean there's always anecdotal evidence about somebody who has been convicted and in a few cases put to death for something that apparently they did not do. So that's the dilemma I think we're, as a society we're facing.

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Not so much your dilemma, which is a little more--not that it's an easy one--but it's a little more on the ground clear-cut kind of thing. [LB1105]

JOSEPH SMITH: I understand that. And one thing, Senator, you mentioned the \$3 million. I think actually that was a conversation that Senator Lathrop and I had. That figure was bandied about, and I indicated I didn't know, but certainly was a burden as you point out. Actually, I did check today. As of June of 2004, the total spent just for the commissioners was \$606,000. [LB1105]

SENATOR ASHFORD: Yeah. I mean it may not even be the... [LB1105]

JOSEPH SMITH: Equivalent of life sentence. [LB1105]

SENATOR ASHFORD: ...so much the out-of-pocket cost as it is the expectation that society has that if you obtain a conviction in a very difficult, horrible case, the expectation by most taxpayers would be, well, carry out the sentence. In actual fact, the sentence doesn't get carried out in many cases for many, many years, 16 years or whatever it is, or 20 years, and if ever. And so the public, this isn't...this cost is hard to quantify, but then there's the sort of cost of, you know, Joe did a good job, got his convictions. But the sentence is not going to be carried out so the public then loses faith in the system. And I think that's a cost too. And I don't know. That's not quantifiable particularly, but... [LB1105]

JOSEPH SMITH: Well...go ahead, I'm sorry. [LB1105]

SENATOR ASHFORD: No, I mean I... [LB1105]

JOSEPH SMITH: Well, I agree. The cost is there. You can't change that. But same as any other case. And there are appeals and there are habeas corpus and those things. But I think... [LB1105]

SENATOR ASHFORD: Right. And those are going to continue. [LB1105]

JOSEPH SMITH: And I think people have a right as a whole to look at each stage. Look at the cops: Did you do your share? The prosecutor: Did you do your share? You know, whoever else. [LB1105]

SENATOR ASHFORD: But what happens, and you're right and these are always great discussions. I wish you'd come down on all our bills, but there are...we hear so often about the mistakes that are made, the exoneration that Senator Rogert dealt with in his bill a couple of years ago, those exoneration. I mean, those are tough. I mean you have potential death cases and you have exoneration eventually. That...anybody looking at that who looks at it in a rational way is going to say, ooh, gosh, you know. We

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don't want to...for the one person, you know, we may execute somebody, but do we have the wrong person in case B over there? [LB1105]

JOSEPH SMITH: And with respect to the cost analysis, this is a bill. And I restricted this because I realize, as Senator Lathrop pointed out, you always have 10 percent of the people have an issue on one side and 80 percent of us are in the middle pretty much. But this is a cost bill. What you have is a bill that... [LB1105]

SENATOR ASHFORD: Right. [LB1105]

JOSEPH SMITH: ...it's going to cost. It may cause a lot of work. And it's going to tell you, if it's successful eventually, how much it costs (inaudible)... [LB1105]

SENATOR ASHFORD: And it may cost more money. But I think at the end of the day it costs more money or it doesn't cost more money, but it's not happening anyway, which I think is what Senator Lathrop keeps talking about. Anyway, I think it's an... [LB1105]

JOSEPH SMITH: What you end up, on the end if you have that, is you have a bill that maybe or maybe not tells you how much it costs to do it wrong. I'm suggesting if you want to do it right, change the statutes. [LB1105]

SENATOR ASHFORD: You can do that, but then what if you have the wrong guy? [LB1105]

JOSEPH SMITH: Well, you can change statutes. You know, for example, mental retardation. In my case, that was raised two years or a year or so after the jury trial. And you could pass... [LB1105]

SENATOR ASHFORD: I understand. We go overboard in this country maybe more than any other country to...well, with the death... [LB1105]

JOSEPH SMITH: Well, you can go overboard but you can still do those things in the time frames. [LB1105]

SENATOR ASHFORD: I gotcha, and you've made that argument before and you make it well. [LB1105]

JOSEPH SMITH: I know, and I don't want to make it now because this is an economic issue. [LB1105]

SENATOR ASHFORD: I understand. Okay, one more. [LB1105]

SENATOR COUNCIL: But that's the exact reason that that appeal was heard was

because that's one of the issues around the death penalty that was decided years ago, and that is that we shouldn't be executing people who are mentally retarded. And because of those level of protections, that's why that appeal was heard two years later, because that's the risk that the Supreme Court wants to avoid having to occur. I mean, Justice Anthony Scalia said: I don't even want to talk about death penalty and the risk of executing innocent people until you can provide me with one example of us doing it. Well, we just provided that example. So, you know, there will soon be an opportunity for the Supreme Court to go back and look at the statement that was made in terms of executing innocent people as being the bellwether as to whether the death penalty should be allowed to continue to be constitutionally authorized in this country. But when we look at, when we look at these costs...and I'm convinced...New Mexico, the state of New Mexico went through the same analysis, you know. And before they conducted the analysis, they did the same kind of polling that's been done here. And the poll numbers showed that a majority of New Mexico residents supported the death penalty. When they did the cost analysis and provided the information as to the cost of pursuing death penalty sentences as opposed to life in prison without possibility of parole, those numbers turned. And one of the reasons that the senators and the representatives in New Mexico had been reluctant to pursue any repeal of the death penalty before, was fear of their constituents not reelecting them because of their belief that their constituents supported the death penalty. But when the real information came out, the facts, the costs and what they would save, and the public safety that they would still be addressing by having people incarcerated for the rest of their natural lives, which we don't have a problem with doing for juveniles, they said let's repeal the death penalty--and they did. And they did it basically because they got rid of the passion, the moral issue argument. They put it all aside. And while I regret that that's the way it happened--because I think we ought to repeal it on moral grounds--but the fact is that they looked at it strictly as an economic issue, and they said the state of New Mexico can no longer afford to do that. And here we are--and Jim Cunningham took my closing, and Miriam, you took my closing--you know, here we are. We can't provide prenatal care; we're searching around for that. We can't provide services for people at Beatrice; we're looking around for money for that. We can't...we've spent five weeks trying to figure out how we can come up with \$100,000 for victims reparations. We can't find that. But when it comes to this, if it costs us \$1.5 million more per case, we're saying we don't care. And I don't buy that, so. [LB1105]

SENATOR ASHFORD: Let's call a truce because it's getting late. [LB1105]

SENATOR LATHROP: So that was the closing? [LB1105]

JOSEPH SMITH: Well, can I just respond to one thing? [LB1105]

SENATOR COUNCIL: Jim Cunningham's. Yes, that will be my close. [LB1105]

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SENATOR ASHFORD: Real quickly, because we have people that are... [LB1105]

JOSEPH SMITH: I know, I know. Just when I said the mental retardation issue, that wasn't on appeal. That was raised by the defense after the trial, so we didn't even have that hearing. It wasn't pretrial as I thought it should have been. It wasn't... [LB1105]

SENATOR COUNCIL: But that's what I'm saying: it was after the trial. Ordinarily, I'm going to tell you in a regular life sentence case they would not have heard that mental retardation claim because it was after the trial. It wasn't raised during the trial. They would have summarily dismissed it. The fact that he was facing the death penalty is the reason they heard that appeal. [LB1105]

SENATOR ASHFORD: All right. Let's...time out now. I call truce. I think that...I don't...no winners or losers. Good discussion as always. Joe, thank you for coming to Lincoln again. [LB1105]

SENATOR LATHROP: Thanks, Joe. [LB1105]

SENATOR ASHFORD: Let's move on to LB988. [LB1105]

SENATOR MCGILL: Does she get to close? [LB1105]

SENATOR COUNCIL: No. No more opponents or neutral? [LB1105]

SENATOR ASHFORD: No. [LB1105]

SENATOR COUNCIL: I'll take a declaration of that fact. [LB1105]

SENATOR ASHFORD: Well, I asked for people and they said no, so. (See also Exhibits 23, 24, and 28.) [LB1105]

SENATOR LATHROP: You're opening on a new bill? [LB988]

SENATOR COUNCIL: Yes, sir. [LB988]

SENATOR LATHROP: Okay. [LB988]

SENATOR COUNCIL: Quickly. These are hopefully...is this LB988, Mr. Chairman? [LB988]

SENATOR ASHFORD: Yes, ma'am. [LB988]

SENATOR COUNCIL: Mr. Chairman, Brenda Council, C-o-u-n-c-i-l, state senator

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representing the 11th Legislative District, and I appear before you to introduce LB988. LB988 is a very simplistic piece of legislation and it's designed to address the issue that's being faced by a number of county and city jails, and that's the issue that individuals...judges often fine individuals as their punishment for committing a criminal offense. Many times those individuals do not have the financial resources to pay those fines. And the opportunity is provided for them to commonly refer to is to sit out the fine, which means they spend time in jail until they have spent enough time that it equals the amount of the fine. And just using Douglas County data, data from the Douglas County Correctional Center, if, for example, an individual has a \$300 fine, they sit that fine out based upon the statutorily set set-off rate. That rate is currently \$60 per day. And someone can...someone from the county can correct me, but I don't think it's been changed in a quarter of a century. Needless to say, the cost of housing that individual has increased significantly during that period of time. So someone who has a \$300 fine, at \$60 a day they would serve five days. Well, if it actually costs the county \$85 a day to house that person, the county is not only unable to release that bed space, they are incurring...they're not recovering the full cost associated. It takes them a longer period of time to recover the full cost. LB988 is simply designed to set the set-off rate, the credit rate, at the daily rate to house an inmate. And when the bill was introduced, I was advised by Douglas County officials that the daily cost of incarceration was \$80, and that's why the bill reflects \$80. I've since been told that it's slightly higher than that. They'll have to advise whether they would like to see it increased to the actual amount that it is. But if you look at the fiscal note for LB988, it really tells you that for Douglas County it could result in Douglas County being able to close one housing unit per day at a savings of \$1,000 per day because it would result in a decrease of at least four inmates per day. I'm sure that there's someone here from Lancaster County. And while Lancaster County--and I don't want to misstate. They certainly appreciate and accept the fact that if the set-out rate is increased, it will reduce the number of days of incarceration. They have expressed a concern that more people may ask to sit out their jail...their fines instead of paying their fines. I don't have any experience in Lancaster County, but my experience in Douglas County is that it's not because you ask to sit it out that they grant it. You have to have actual cause demonstrated that you're incapable of paying before the judges allow you to sit it out. So I'll just let... [LB988]

SENATOR ASHFORD: Brenda, do you want to introduce LB990 too? [LB988]

SENATOR COUNCIL: Yeah, and LB990, I'll go ahead and do it. It's also a bill designed to help relieve county and city jails of their burgeoning inmate population. Under current law, the good time that's granted to individuals who are incarcerated in county or city jails is kind of a convoluted formula. It's a day after every 15 days, and people have to keep count of the 15-day intervals. What LB990 is designed to do is to conform the good time rate for city and county jails to the rate that applies to someone incarcerated in the Nebraska correctional system. And it does not...under the current statute you don't begin to be eligible for good time until after you've served 15 days, and that's how

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LB990 is crafted. After you've served 15 days, you're eligible for a one-to-one for good time. And again I'd just direct your attention to the fiscal note because it shows the savings that both Douglas County Corrections and Lancaster County Corrections anticipate resulting from enactment of LB990. And specifically for Lancaster County, they estimate that using an average annual population growth of 5.6 percent, the potential for fiscal year 2010 in savings could be approximately \$1.4 million and for fiscal year 2011 approximately \$1.5 million. Thank you. Any questions? [LB990]

SENATOR ASHFORD: That's good news. Thanks, Brenda. Any questions? Seeing none, Marty, you're up. And you can talk about either bill or both or whatever you want to do. [LB990 LB988]

MARTY CONBOY: Thank you very much, Mr. Chairman. Senators, I'll be brief and I will address both bills. The first bill is fairly simple. As Senator Council has pointed out, we are losing on just about every aspect of this prospect. You know, people who we don't want in jail are in jail. We've got to pay to keep them in jail, and they're sitting it out at a rate at less than what we're paying. So I mean it's just a lose all the way around. And these are people typically who weren't...well, in fact in every case, they weren't sent to jail. This isn't part of the sentence. So they're just there because they don't have any money or didn't pay as they told the judge they would, and so they end up sitting in jail. It costs us about \$86 a day right now in Douglas County. So I would agree with Senator Council, if we could make it \$90 it would probably avoid us coming back and doing this again in a few years because we would just be then losing ground again. And those faces are small compared to LB990. In that bill...and I brought with me and I'm not going to publish it to the body, but I asked for today and got a copy of what some other people here have, too. This is the way they calculate good time at the Douglas County jail right now. And it is literally so hard to calculate that they need to have a diagram of every single possible sentence number so they can tell how much good time it is because it's just a strange sentence. For a person who gets 15 days in jail, serves the same amount as a person who gets 20, but...and it jumps around like that to where it gets to the point where, with our state system if you get like 8 or, you know, 10 or 11 months in jail, you'd be asking the judge to give you another month or two so you can serve less time. I mean we are literally to that stage. And when you're asking for more jail so you don't have to stay in jail as long, obviously there's something screwy about the calculation. That will save money. And I'm not a big advocate of letting people out of jail, but I will tell you this--and I've been at this awhile: jail space is a scarce resource. There's bond issues all over the state to build new jails. Jails are full. Ours is full. I'd like to see people who belong in jail, in jail. But the fact is, in virtually every state they're kicking people out of jails because they're too full. And because they're too full, they're doing it in a way that is just sort of random. They will just say certain offenses or certain types of people without much thought about who deserves to be there or who doesn't. At least this bill ensures some formula that will apply to everybody equally. The people who are sentenced know how long they have to sit. They don't have to go through some formula

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after they get to jail. The lawyers will know. The judge knows when they pronounce the sentence exactly how long it is because, I guarantee you, no judge has this formula and can really tell you exactly, when they say you're going to serve 45 days, how many days the person is really actually going to serve. So it will be an improvement in those ways. The only comment I would make--and it's a debate now as to whether or not, you know, has an effect on how much savings is involved--the calculation begins after the fifteenth day. And the question...and I think there's some disagreement as to whether, then if you get 16 days, that it automatically reverts to 8 days, or is it just one for one after the 15 days? And is that, Senator... [LB988 LB990]

SENATOR COUNCIL: The intent is one for one after the 15, and we took the language of the current statute that you don't start accumulating until after the fifteenth day. [LB988 LB990]

MARTY CONBOY: And that was my read. [LB988 LB990]

SENATOR COUNCIL: So if we need to further clarify that, but that is the intent. It says after the fifteenth day have his or her term reduced one day for each day of his or her sentence during which he or she has not committed. And if we need to make that clearer, we will do so. But that's the intent is that you're going to serve at least 15 days. [LB988 LB990]

MARTY CONBOY: And I think the calculations of savings are based on that. [LB988 LB990]

SENATOR COUNCIL: Right. [LB988 LB990]

MARTY CONBOY: And, in fact I'm sure they are. And \$1,000 a day is significant, and I suspect it's going to be more than that, and as time goes on it will be more than that. So from an economic standpoint and a fairness standpoint, there's advantages to both of these bills. I'd be glad to answer any questions. [LB988 LB990]

SENATOR ASHFORD: Any questions of Marty? Yes, Senator Coash. [LB988 LB990]

SENATOR COASH: Thank you, Chair. I'm getting these two a little bit confused in my head. Is there a maximum of days you can sit out a fine? I mean if... [LB988 LB990]

MARTY CONBOY: No. [LB988 LB990]

SENATOR COASH: No. So it's a fine. You can sit it out till you're done. [LB988 LB990]

MARTY CONBOY: Right. And at the current rate of \$60 a day, you know, a lot of the sentences like for DUI are like \$500 and costs, so. [LB988 LB990]

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SENATOR COASH: Five days. [LB988 LB990]

MARTY CONBOY: There would be people sitting as much as 10 or 20. It just kind of depends on, you know, if you have several offenses. [LB988 LB990]

SENATOR COASH: Okay. Does the good time law apply to sitting out fines as well? [LB988 LB990]

MARTY CONBOY: No, it does not. And worse than that--I should bring it up if no one else does--you're not eligible to get into any of the programs for rehabilitation, for house arrest, for work release. None of those things are typically, because they're not sentenced. I mean it's not part of a regular sentence like a normal, you know, you get ten days in jail and can go to (inaudible). [LB988 LB990]

SENATOR COASH: I wonder if we shouldn't lower it to 2 bucks a day. Then people would be disinclined to...they'd pay rather than sit it out. [LB988 LB990]

MARTY CONBOY: Well, and that's a...and I think that's the point that's... [LB988 LB990]

SENATOR COASH: I mean it's a balance. I get what Senator Council is trying to do to... [LB988 LB990]

MARTY CONBOY: No, I understand. And I think you'll hear perhaps some comments, too, about at what point it becomes so much that people quite paying their fines, and we don't want that to happen either. [LB988 LB990]

SENATOR COASH: Yeah. Thanks. [LB988 LB990]

SENATOR ASHFORD: Thanks, Marty. I do, now that we're done with hearings, I do want to publicly thank you for the work you're doing on juvenile justice and your commitment to, which is really extraordinary, to divert some of these juvenile cases from county court into the JAC. And I know that's going to be a hard process, but it's absolutely phenomenal commitment on your part on your office, and I know you're capable of doing that. And I think it's going to make a big difference to a lot of lives, and I just personally want to thank you again for that commitment. [LB988 LB990]

MARTY CONBOY: Well, thank you. I appreciate it. It's about as important a thing as is going on in the state right now. [LB988 LB990]

SENATOR ASHFORD: Thank you. Mark. Here you are. [LB988 LB990]

MARK FOXALL: Good afternoon. Mark Foxall. I'm the deputy director, Douglas County

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Department of Corrections. Marty Conboy has done an excellent job of really laying out what I've come to speak here about with LB990 and LB988. With LB988, you have the fiscal impact statement in front of you. Our facility is approximately 1,434 beds. Our last large remodeling or additional bed space concluded in 2004. Last summer, our average daily population was approximately 1,350 or so, so we were almost full. These two bills are going to help us ease our overcrowding and our burgeoning population, but also they're going to help us with fiscal issues related to incarcerating offenders. As Mr. Conboy indicated, in LB988 we're going to be able to save approximately four beds a day or at least four inmates a day. Now that may not seem like a lot, but that could be the difference between opening and closing a housing unit, and a housing unit for our operations runs at approximately \$1,000 a day. With LB990, you can also see that we might potentially realize a savings of 66 inmates a day. Our housing units run about 62-64 person housing units, and that's a significant cost savings to us as well. And again, that's another savings at \$1,000 a day. [LB988 LB990]

SENATOR ASHFORD: Thank you, Mark. Any questions of Mark? It really is a significant piece of legislation. I appreciate it. Good. Thanks, Mark. Thanks for coming down. Any other proponents? [LB988 LB990]

JOE KOHOUT: (Exhibit 13) Chairman Ashford, members of the Judiciary Committee, Joe Kohout, K-o-h-o-u-t, registered lobbyist appearing on behalf of Lancaster County Board of Commissioners. I passed out a letter from Mike Thurber, our director of corrections, and we are in support of both LB990 and LB988. I think when you see the letter from Director Thurber you'll see his comments. The concern that Senator Council raised is the question of if we increase this amount, and I think it's a struggle that they have. Because if we increase the amount, do people look at it from the perspective of, well, I don't make 90 bucks a day, but yet we're going to increase this amount so I'll go ahead and sit it out. And that's the frustration I think that counties face with this issue because we're paying on both sides. And I think that issue has been addressed. But with that...and so, Senator Coash, I think that kind of goes to your question. You know, if we're going to set the amount, how do we set that amount? So with that, I'll stand for any questions. [LB988 LB990]

SENATOR ASHFORD: Senator Council. [LB988 LB990]

SENATOR COUNCIL: And thank you, Mr. Kohout. I didn't, in our conversation on the bill, I didn't ask you...I can't remember if I told you that the number that I was originally provided as the per-day cost to house an individual in Douglas County was \$80 and it's really \$85, and that the suggestion was to move it to \$90. And I didn't ask you whether Lancaster County... [LB988 LB990]

JOE KOHOUT: And I did ask that question of Director Thurber. And I'm going to give this number; it's going to be someplace in this range. But once the new jail is opening,

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he thought the range would actually be between, as I recall, \$92 and \$95. [LB988 LB990]

SENATOR COUNCIL: Okay. So if I amend it to \$90, at least you're closer to... [LB988 LB990]

JOE KOHOUT: It's getting close. [LB988 LB990]

SENATOR COUNCIL: You're closer to your cost there. And on the issue of sitting out, it's just been my experience that when someone asks...advises the judge that they can't afford to pay the fine, I don't ever recall the judge telling them, you know, how much it is a day. They just tell them, you know, you'll go over to the county jail and you'll get out when you reach the amount. That's to your point, Senator Coash. I don't know that the individuals actually know what the set-off amount is. I don't think the judges...at least I've never seen a judge tell them what the set-off amount is. [LB988 LB990]

SENATOR ASHFORD: Yes, Senator Christensen. [LB988 LB990]

SENATOR CHRISTENSEN: Thank you, Chairman. I guess this is old language, and I can ask Senator Council, too, if you need. But on the bill in LB988, on line 6 it says "or is confined in jail for any fine or costs of prosecution for any criminal offense has no estate with which to pay the fine." So you can't elect to sit this out unless you can't afford to pay. Correct? [LB988 LB990]

JOE KOHOUT: Right. [LB988 LB990]

SENATOR CHRISTENSEN: So the higher we put this, benefits the counties on the offset. We're not going to run the risk of people choosing to sit it off. [LB988 LB990]

JOE KOHOUT: And I think that's true, Senator Christensen. And I think it comes down...and trust me, it's been awhile since I was in county court practicing. [LB988 LB990]

SENATOR ASHFORD: Or in jail. (Laughter) [LB988 LB990]

JOE KOHOUT: Or in jail either. So I think, you know, it's a rubber meets the road issue. I mean I think it's, you know, are...is the process being followed?--and how can we ensure that the process is being followed so that the taxpayers aren't bearing that burden? I think that's fundamentally where it comes down to. But I'm happy to take that thought and work with it. One of the conversations we've had is off, not in this room, but is the question of, you know, do we get together and talk about what the future of this sort of section is? And I think that's a legitimate question going forward. [LB988 LB990]

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SENATOR CHRISTENSEN: Thank you. [LB988 LB990]

SENATOR ASHFORD: Thank you, Joe. [LB988 LB990]

JOE KOHOUT: Thank you. [LB988 LB990]

SENATOR ASHFORD: Any other testifiers? Katie. Looks like you're in the wrap-up position here. [LB988 LB990]

KATIE ZULKOSKI: Good afternoon, Senator Ashford. I will be cleanup. Katie Zulkoski, Z-u-l-k-o-s-k-i, testifying today in support of LB990 on behalf of the Nebraska State Bar Association. We do understand that it is important to bring clarification to this issue and to bring the statutes in line, the city and county jails, to bring them in line with the way the state is maybe possibly more effectively handling this. [LB990 LB988]

SENATOR ASHFORD: Thank you. [LB990 LB988]

SENATOR LATHROP: Always brief. Thank you. [LB990 LB988]

SENATOR ASHFORD: Okay. I don't think...it seems like no one else wants to testify. That closes the hearing on these two bills. Senator Council, do you want to waive closing? [LB990 LB988]

SENATOR COUNCIL: Waive closing. [LB988 LB990]

SENATOR ASHFORD: Okay. (See also Exhibits 25 and 26) [LB988 LB990]

SENATOR LATHROP: Bless you. [LB988 LB990]

SENATOR ASHFORD: Thank you all. [LB988 LB990]