

LATHROP [00:00:01] Good afternoon. My name is Steve Lathrop. I am the state senator from District 12. That includes Ralston and parts of southwest Omaha. I am also the Chair of the Judiciary Committee. Thank you for being here today. We have a little preamble that we go through before we begin our hearings, and that's just so everybody kind of understands how the hearings are conducted and the fact that we use a light system, which is kind of my favorite part of this. On the table inside the doors when you came in, you will find yellow testifier sheets. If you're planning on testifying today, please fill one out and hand it to the page when you come to testify. This helps us keep an accurate record of the hearing. There is also a white sheet on the table if you do not wish to testify but would like to record your position on a bill. Also, for future reference, if you're not going to testify in person on a bill and would like to submit a letter for the official record, all committees have a deadline of 5:00 p.m. the day before the hearing. We will begin bill testimony with the introducer's opening statement. Following the opening, we will hear from proponents of the bill, then opponents, and finally, by anyone speaking in the neutral capacity. We will finish with a closing statement by the introducer if they wish to give one. We ask that you begin your testimony by giving us your first and last name and spell them for the record. We utilize an on-deck chair to the left of the testifier's table; in fact, we have an entire row. Please keep the on-deck chair and row filled with the next person to testify to keep the hearing moving along. If you have any handouts, please bring at least 12 copies and give them to the page. If you do not have enough copies, the page will help you out by making more. We will be using a light system. This is my favorite part. We will be using a light system. When you begin your testimony, the light on the table will be green for two minutes. A yellow light will come on; that's your one-minute warning, so you'll have a total of three minutes to testify. When the light comes on red, we ask that you wrap up your final thought and stop. That's not to say that you won't have questions and the questions will be outside of the light system, but we do observe the light system for your prepared remarks. As a matter of committee policy, I'd like to remind everyone, the use of cell phones and other electronic devices are not allowed during public hearings, though senators may use them to take notes or stay in contact with staff. At this time, I'd ask everyone to look at their cell phones and make sure they're in the silent mode. Also, verbal outbursts or applause-- and I know we're taking up civil procedure today, so that's not likely. Verbal outbursts or applause are not permitted in the hearing room. Such behavior may be cause for you to be asked to leave the hearing. You may notice committee members coming and going. That has nothing to do with their view of the importance of the bill being heard, but some senators may have bills to introduce in other committees or have other meetings to attend. We are holding our hearings in the Warner Chamber while our regular hearing room is being renovated. We ask that you remember water bottles, soda cans, and cups are not permitted on the desks, and that's to avoid damaging the desks in the Warner Chamber. Assisting the committee today are Laurie Vollertsen, our committee clerk; Neil Erickson and Josh Henningsen, our two legal counsel. And Nedhal and Alyssa, who are both students at

UNL, are our committee pages. And with that, we'll have the senators introduce themselves and we'll be onto the first bill, beginning with Senator Wayne, who's not here. [LAUGH] We'll-- we'll start with Senator Slama.

SLAMA [00:03:46] Julie Slama, District 1, Richardson, Nemaha, Pawnee, Johnson and Otoe Counties.

LATHROP [00:03:55] You're next, Ernie. You want to introduce yourself?

CHAMBERS [00:04:00] Oh. Ernie Chambers, District 11, Omaha, Nebraska.

BRANDT [00:04:05] Tom Brandt, District 32, Fillmore, Thayer, Jefferson, Saline, and southwestern Lancaster County.

DeBOER [00:04:11] Hi. I'm Wendy DeBoer. I'm from District 10 which is Bennington and the surrounding areas in northwest Omaha.

LATHROP [00:04:16] Thank you. And with that, we will begin our opening on the first bill which is LB324. And, Senator La Grone, welcome to the Judiciary Committee.

La GRONE [00:04:28] Thank you, Mr. Chairman and members of the committee. My name is Andrew La Grone. I represent Gretna in and northwest Sarpy County, which is the 49th District. Today I'm introducing LB324 to bring Nebraska's 911 liability in line with 44 other states who provide enhanced liability protections to 911 service providers. The changes in the bill specifically apply to the service providers providing next-generation 911 service, which is also referred to as next-gen 911. As a starting point, next-gen 911 services are Internet protocol-based systems that process all types of emergency calls, including voice, text, data, and multimedia information. The technology delivers the emergency calls, messages, and data to the appropriate public safety answering point and other appropriate emergency entities based on location of the caller. As Nebraska moves ahead with developing and deploying our next-gen 911 system, it is important to match Nebraska's liability provisions with suggested guidelines from state next-gen 911. As recommended by this report but put together by 911.gov, LB324 is not limited to specific forms of communication and is technology neutral so that it's applicable to any next-gen 911 service. The bill brings Nebraska in line with other jurisdictions and any Industrial Council for Emergency Response Technologies report-- an Industrial Council for Emergency Response Technologies report shows that only two states have equal or lesser liability protections than what currently exists in Nebraska for providers of next-gen 911 services. Interest-- interestingly, Nebraska's protection for service providers is even less than the protections provided in California law. There will be industry providers following me who can talk more about how this change will impact Nebraska's moved to next-gen 911, but I'm happy to answer any questions you may have.

LATHROP [00:06:18] I do not see any questions, Senator La Grone. Thank you for your introduction. We'll take proponents. How many people are here to testify on this bill, by a show of hands? OK, perfect. Welcome.

GARY WARREN [00:06:32] Thank you. Good afternoon, Chairman Lathrop and members of the Judiciary Committee. My name is Gary Warren, G-a-r-y W-a-r-r-e-n, and I am testifying in support of LB324 on behalf of the Nebraska Advocacy Group, a group of 11 Nebraska telecommunications companies providing customers with telephone and broadband service throughout the state; also testifying as a board member and on behalf of the Nebraska State Chamber. And last, but certainly not least, I am also testifying on behalf of Hamilton Telecommunications, based in Aurora, and specifically our subsidiary Hamilton NG911 Services, Inc., which is a service provider for next-generation 911 services. Our group of telecommunications provider approached Senator La Grone and asked him to introduce this bill because of its importance to the state. Nebraska is on the cusp of developing our 911 system, the next-generation one, and it is important we do it right. Next-gen 911 services are different than traditional services because of an individual's mobility and ever-expanding access to new communication technologies. These factors require the 911 community to think more broadly, expand its services, and operate with the utmost efficiency. The current statutory language does not provide the needed protections for NG911 service providers and it certainly puts us at a disadvantage relative to our provision of service for traditional voice-based 911 service and relative to our position doing business in other states. Our law does not reflect the fact that today's systems are fully integrated, highly advanced, increasingly complicated. In addition, multiple communications companies and third-party vendors are involved, working together seamlessly behind the scenes to connect citizens with emergency response's systems. If companies are not offered adequate liability protections via statute, bids to provide NG911 services in Nebraska will be higher; 911 surcharges paid by phone may be increased to help cover these unnecessary costs. Now I do want to make sure this committee does not think our companies are trying to dodge responsibility for providing high-quality service for the life-saving task of 911 services. Instead, we are asking for predictability in doing so. We submit that the way to require the highest level of service and competence is by contract. Hamilton has been in similar business of the relay services for the deaf and "harding" for some 28 years. We are one of three major players in the nation. We have roughly 20 state contracts. Throughout our time in that business, it hasn't been-- we've never been sued, I can't remember the last time our service was down, and the way our performance is controlled is by contract. The utility commissions or the other appropriate agency in each state sets up a contract system where there are liquidated damages or penalties if we don't hit certain service levels. And it's-- it's an administrative policy; in fact, we have some states where if we miss a standard, we have to deduct it from the bill we send them that month. It is a much more efficient way to administer control and control the quality of service than the threat of a potential lawsuit and the uncertainty of when negligence or reasonable care standard is met. For all these reasons, we encourage you to enact this bill and get the

standard in line with what we're seeing in other states and let the contract law control, and efficiently control, at a reasonable cost for Nebraska citizens the implementation of next-generation 911 services. Thank you for consideration. I'd be happy to take any questions.

LATHROP [00:10:16] Senator Chambers.

CHAMBERS [00:10:17] In the first part-- do you have a copy of the bill before you?

GARY WARREN [00:10:22] I do.

CHAMBERS [00:10:23] OK. It's only one-- one page, but it'd be on page 2. In subsection (1), the standard for liability is failure to use reasonable care. That's the ordinary negligence standard.

GARY WARREN [00:10:43] Correct.

CHAMBERS [00:10:44] When we get down to subsection (2), why should they be allowed to not use reasonable care and still not be liable? They're liable only if they use gross negligence or wrongful acts. So why should the standard be lower for them?

GARY WARREN [00:11:05] Well, I think the people of Nebraska through their government entities are taking on the risk of 911 services. So if-- we are not attempting to change the standard for the government entities. And we're not necessarily opposed to that, but we think-- we think the issue with private entities-- when the next-generation 911 is implemented, someone's going to get a state contract; they're going to have multiple subcontractors. Today, when the 9 11 center buys a circuit from Hamilton Telephone Company, I have a tariff which says gross negligence is my standard. Tomorrow, when you do next-generation 911, as it stands today, you've upped the standard. And to have us, we're either going to charge more for that circuit in order to cover the risk, and we won't know how much if it's a-- it's a negligence and reason-- you know, everybody gets sued in those situations and I-- I think what's going to happen, your service costs are going to go way up. Whether or not you want to expand this standard for the 911 centers that the government operates, it's certainly in the prerogative of the Legislature.

CHAMBERS [00:12:16] I'm looking at the gross negligence part. Why should these people be held to such a low standard before they're liable? What do they do that is ordinarily careless? But you have to accept this lack of due care on their part. In other words, they don't have to use due care. They can be careless and not be neg-- not be liable. Why should we excuse them from exercising due care? That's what gross negligence does. It says you can be careless, somebody can be harmed by it, but you're not going to be held liable. Are you telling me that if the standard is the same as for these governmental

entities and everybody else in subsection (1), that there will not be those who will provide if they're held to a reasonable care standard?

GARY WARREN [00:13:18] I--- yes, I think there will be some providers who say, I won't do that. There will be some that will say, hey, I'll do it but for a higher price. And I think what I'm suggesting is when you-- with the private entities that are going to contract with the government for the provision of telecommunication circuits, Internet routers, the various technology that supports the government services, I think-- I think they're going to be cheaper. I think the predictability of the risk they have, if you use service-level agreements and liquidated damages penalty, will be a much more efficient way of making sure I do my job. And I think the contract can control my performance. It certainly has in relay for the last 28 years. We haven't been down in years.

CHAMBERS [00:14:04] You're speaking for whom now?

GARY WARREN [00:14:06] I'm speaking-- when I speak just now, I'm speaking for Hamilton Telecommunications which is in the 911 business; we're also in the relay business.

CHAMBERS [00:14:14] Are-- is it a national?

GARY WARREN [00:14:16] Our relay business is national. We have 20 state contracts.

CHAMBERS [00:14:19] So you're telling me, in speaking for those 26, that if they're held to a reasonable care standard, they-- they won't do anything in Nebraska? They don't want to operate in Nebraska?

GARY WARREN [00:14:36] Well, let me back up. The 20 states I'm talking about are the relay service contracts we have.

CHAMBERS [00:14:42] OK.

GARY WARREN [00:14:42] OK.

CHAMBERS [00:14:43] So how many providers are you talking about?

GARY WARREN [00:14:46] Well, primary providers in the 911 business, there's maybe six to a dozen, you know, across the nation, and then there's a-- there's a-- a voluminous number of subcontractors. And that's part of the reason for this bill is if I as a general contractor in Nebraska bid-- I bid the next-generation 911 business, if I have to convince every party that they have to take on this type of liability when quite frankly the telecommunications carriers don't have to do that today with their tariffs, it's going to cost more money. And what's more is the threat of a lawsuit is not an efficient way to

control their performance and make sure their circuit is up. The best way to do that is put service-level penalties in. I get to fine them or I get liquidated damages if they fail. And that's a much more efficient and effective way for me to control the performance.

CHAMBERS [00:15:39] But if they don't perform well, then there could be serious consequences for those who are relying on that, so I'm not concerned about the convenience of the ones who want to make money on this. I'm concerned about those who might be harmed if careless activity is engaged in. You're looking at it from the standpoint of the-- how much money is going to be in the pockets of those you represent. I'm looking at it from the standpoint of--

GARY WARREN [00:16:04] I understand.

CHAMBERS [00:16:05] --people should be able to rely on careful services being provided and not saying in the statute from the beginning we're excusing them from exercising ordinary care. In other words, they can be careless and they're still going to be allowed to do this. But I don't want to keep repeating. I just wanted to put that out there.

GARY WARREN [00:16:26] OK.

CHAMBERS [00:16:26] That's all that I would have. Thank you.

GARY WARREN [00:16:27] Thank you.

LATHROP [00:16:29] I think that's it. Thank you for your testimony today.

GARY WARREN [00:16:32] Thank you.

LATHROP [00:16:53] Good afternoon. Welcome.

BRIAN THOMPSON [00:16:55] Thank you. My name is Brian Thompson, spelled B-r-i-a-n T-h-o-m-p-s-o-n, and I'm here today as a proponent of LB324 on behalf of Consolidated Companies, which I'm employed by and registered as a lobbyist for, and also the Nebraska Telecommunications Association, on behalf of them. I also serve as a member of the next-Generation 911 system advisory board for the state of Nebraska. The work to enhance the Nebraska 911 system is a big undertaking. It involves multiple technologies and systems and providers. Our state will be issuing its first RFP, or request for proposal for the next-gen 911 system this spring. Nebraska is more likely to attract a better group of reliable and responsible network providers of this complex network if we are willing to assume risks that come with offering this service and if they're a reasonable level of liability protection. And I-- I follow Mr. Warren's testimony in-- in that liability protection. Modernization of the Nebraska 911 liability protection is critical to reflect today's integration. Senator La Grone mentioned the guidelines for the state next-generation 911

legislative language. That is a best-practice document and can be found at the Public Service Commission's 911 Web site, and it identifies that the 44 other states in the nation use the type of language proposed in LB324 for its next-generation 911 systems. So with that, I would include my testimony and support LB324.

LATHROP [00:19:11] Senator Chambers.

CHAMBERS [00:19:11] I hear the slogan in almost every activity, "evidence-based." What does the evidence show with reference to these states that we're told have equal or lesser liability protection? It says two states have equal or lesser-- in other words, two other states plus Nebraska don't let you get off as easily as these other states. Before we get there, who put together the document that lays out what are called the best practices? Who produced that document?

BRIAN THOMPSON [00:19:52] I believe that is 911.gov, which is a federal organization of 911 providers.

CHAMBERS [00:20:01] And they're interested-- they do what they do for money, don't they?

BRIAN THOMPSON [00:20:05] For the most part, they're government entities and employees.

CHAMBERS [00:20:08] Say it again?

BRIAN THOMPSON [00:20:09] For the most part, they are government entities and employees, like 911 system operators.

CHAMBERS [00:20:18] So we're not talking about any entities that will make a financial profit from providing this service.

BRIAN THOMPSON [00:20:28] Not that put together the best-practice information for the most part. I would--

CHAMBERS [00:20:34] Let me ask you the question again. Are these other two states getting lesser service because they have a higher standard of care that has to be met?

BRIAN THOMPSON [00:20:47] I don't have any knowledge of those two states' quality of service to be able to answer your question.

CHAMBERS [00:20:55] Do you think that there will be a lesser quality of service in Nebraska if we don't give you the gross negligence standard?

BRIAN THOMPSON [00:21:05] I think it'll boil down to the cost of the customers and the residents of Nebraska, because with the-- the lower standard of negligence, the cost of this project will be less. And if you use a service contract which spells out what we have to do and then spells out the fine that we would have to pay if we don't do it properly as a provider, we'll know what our-- our-- and have an understanding of what our cost could be in that case. Leaving the language in the higher standard would make that much harder to know.

CHAMBERS [00:21:51] Would the-- in Nebraska, would the Public Service Commission set the level of the fine that would be levied?

BRIAN THOMPSON [00:22:02] They could be given that-- that as a responsibility. And the Public Service Commission today contains the director of the 911 and the 911 next-generation system's overall department, so they-- they make the rules today.

CHAMBERS [00:22:24] If the fine were high enough, would that deter some of these entities from wanting to set up in Nebraska? If the fine for a dereliction were too high, would that prevent them from setting up in Nebraska, in your opinion?

BRIAN THOMPSON [00:22:38] It could. It could, in my opinion, yes.

CHAMBERS [00:22:41] So Nebraska then could be without this service altogether. That's what you're telling me?

BRIAN THOMPSON [00:22:48] I would think there would be bidders, but I would say that it would cause the bidders to be higher.

CHAMBERS [00:22:53] Would they be able to perform the service as well as if the standard of negligence that they have to meet were lower? How much more, how much higher would that cost if we hold you to an ordinarily-- an ordinary negligence standard? Give me a percentage, if you can, because you're testifying. You were paid to be informed. You know that some places you go people are going to ask you these questions, so you ought to have something, even if it's made up like a lot of these things are. What is the made-up difference between what would be charged for an ordinary negligence standard as opposed to a gross negligence standard?

BRIAN THOMPSON [00:23:37] Well, that would be kind of a wild guess from my standpoint since I haven't modeled anything out.

CHAMBERS [00:23:47] Speculate.

BRIAN THOMPSON [00:23:47] I would guess maybe 10, 15, 20 percent higher, somewhere in that area. It would just depend.

CHAMBERS [00:23:57] OK. I don't want to be repetitive and what I need in the record is now there, so thank you.

LATHROP [00:24:02] Senator DeBoer.

DeBOER [00:24:05] Good afternoon. Can you tell me what's the current standard of care under the current, not next-gen but "now-gen" 911? What's the standard of care for-- for--

BRIAN THOMPSON [00:24:16] I'd have to refer back. It's the gross, right? Yeah, it's gross negligence.

DeBOER [00:24:27] OK. What makes-- so what's the-- the general, brief, nutshell difference between 911 service as we now have it and next-gen 911 service?

BRIAN THOMPSON [00:24:40] It's considerably different because of the type of network that we would be building. The-- in the new system, it would be an IP-based network that would be interconnected. And today, the way the 911 system works is there are the 911 centers and they have usually one or two TDM-based circuits that go to them to provide their network straight from the local-- the telephone office, essentially. And in each case, in each of those locations, they would have one or two different circuits that would provide the services to those locations. In the-- in the new system, it would be one big, redundant network that has interoperating servers and a lot of different what I would call redundancy built into the network, as well as they would peel off the 911 calls from things like the open Internet so that those would stay separate to protect the hardware and software that's on the systems. So there are-- it's going to be a quite different, more complex, and totally redesigned network.

DeBOER [00:26:03] And what are the kinds of-- I mean, so we're talking about gross negligence or-- or simple negligence. What-- what other negligence is here that happen? What-- what's the kinds of scenarios that are happening that we're talking about?

BRIAN THOMPSON [00:26:18] If, for example, a carrier was-- had a network that was cut or-- or damaged by a storm, or something along that line, and would stop delivering the services to the 911 center, that would be a problem. In a lot of cases today, you take out your cell phone and dial 911 to go to the public answering point where the 911 calls go to be routed. What has to happen in that case today is that the-- that wireless cell phone call has to go back to the wireless switch and then out to wherever that location is. Let's say it's in Lincoln. The call would go to Omaha, to the wireless switch, back to 911. It would figure out what cell site it's on and then route it to the right public answering point. There's a lot of back and forth going on there. A lot of that would continue to happen, but it would hit an IP network and then it would be redundant. If the Lincoln site was taken off-line for some reason, the call-- in the new next-gen system, that call would be

rerouted to the most nearby location and then handled. Today we don't have that kind of redundancy built in the network because of the non-interconnected sites.

DeBOER [00:27:49] Thank you.

CHAMBERS [00:27:57] I--

LATHROP [00:27:57] I-- one second, if I can.

CHAMBERS [00:28:03] Go ahead. I didn't know you [INAUDIBLE]

LATHROP [00:28:03] We now have 911 service. Have any of the providers of the 911 service, the people that you're concerned about today, been sued?

BRIAN THOMPSON [00:28:13] I don't have knowledge of the lawsuits of other carriers, so I'd hesitate to answer that question.

LATHROP [00:28:24] Do you have anything to do with the people that are doing it now or just the next-gen people?

BRIAN THOMPSON [00:28:31] I have worked with the next-gen group for only a year since it was just passed in the last session in LB993, so.

LATHROP [00:28:41] Do you expect to do this carelessly?

BRIAN THOMPSON [00:28:43] Absolutely not.

LATHROP [00:28:45] See, I have to tell you that-- so when-- when people have a right to make a claim because they've been hurt, I believe it makes people who provide services or drive or perform surgery or fly airplanes more careful. Right? That's the idea behind-- there are two, two principles there. One is to compensate somebody that's been hurt through someone else's carelessness, and it also makes people a little more careful. I think people drive more careful or doctors are more careful in the way they provide care or surgery; and pilots are more careful the way they fly, and companies are more careful because they don't want to-- they don't want to be the object of a claim. What we've seen in the last 20 years is that everybody who brings a bill in wants immunity along the way. And you can-- what-- basically what you say is, well, if we do something wrong and we're careless, it's going to be borne by the person who gets hurt instead of shared by all the people who are paying for the service. And I don't think it's any secret that I'm not a fan of immunities and this is essentially an immunity. And generally, when you drill down, most people say, we intend to do this carefully, we do it carefully, we don't have a history of being sued but, you know what, this is kind of what everybody else is putting in their loss, we'd kind of like it too. And when-- we when we drill down, it really isn't the

difference between people providing the service. And I-- and I will tell you, if the-- if the cost increased by 20 percent, I would be really nervous about somebody's degree of care in providing 911 services because they're trying to establish what the risk is or the cost for all the lawsuits that they expect to happen. If you'd have said 1 percent, I would have been probably thinking that's-- and I know we were just trying to get you to-- to shoot from the hip, but that's-- that's my concern with bills that provide for immunity, because, you know, immunity gives people a pass and, you know, you-- you don't want your pilot to have immunity, you don't want your doctor to have immunity, and-- and other people in trust. And when it comes to the 911 service, next-gen or otherwise, if I got to call 911, I want somebody answering it and sending an ambulance. Right?

BRIAN THOMPSON [00:31:14] Sure.

LATHROP [00:31:15] OK. Anyone else? Senator Chambers.

CHAMBERS [00:31:17] If I may, who drafted this bill? Is it a nationally presented bill that we have here? This is con-- this-- this language is what states all over the country have adopted?

BRIAN THOMPSON [00:31:38] It--

CHAMBERS [00:31:38] Well, look on page 2 if you have that copy.

BRIAN THOMPSON [00:31:41] I didn't bring my copy of the bill with me but--

CHAMBERS [00:31:43] OK, well, I will ask you. In line 1 what they are striking, "reasonable," "failure to use reasonable care," they're striking that. And then "intentional" is left there, because that lowers the standard, then they add "wrongful." So it has to be an intentionally wrongful act. What kind of standard is that? That's-- that's-- that's worse than just saying reckless. This is saying that if you don't intentionally do a wrongful act, the act is wrongful and you do that, then you're not liable. You have to intentionally do this wrongful act. Why did they put those two words together? That's to do away with almost any and all liability, isn't it?

BRIAN THOMPSON [00:32:45] I would-- I would probably defer that to the lawyers.

CHAMBERS [00:32:49] If they say in one line "gross negligence," that-- that's a lot of negligence. That is almost intentional or reckless. But that's not enough. It-- the standard of gross-- here's ordinary negligence, gross negligence, then intentional wrongful acts where you not even talking about negligence now. You're talking about intentional wrong before these people are held accountable. And did you read the bill?

BRIAN THOMPSON [00:33:24] Yeah. Yes, I did.

CHAMBERS [00:33:27] Are you a Nebraska person?

BRIAN THOMPSON [00:33:28] Yes.

CHAMBERS [00:33:29] Oh, so you knew that I'm not a-- or do you think I'm a rube, r-u-b-e?

BRIAN THOMPSON [00:33:31] No.

CHAMBERS [00:33:34] Do you think I understand English words when I see them written?

BRIAN THOMPSON [00:33:37] Very well.

CHAMBERS [00:33:39] OK. So if I see the two words together, an "intentional, wrongful" act, that is preposterous to be put into a bill. And I want that into the record because I want people to understand why I was so upset with this bill. I'm upset with the one who brought it who would foist something like this off on the public. Nobody could get me-- as a senator who took-- I don't swear-- affirmation to discharge the duties of my office to the best of my ability, and my duty is to see to the best interest of the public, the public welfare, they couldn't get me to bring a bill that says that the people I'm supposed to represent are allowing the one who provides the service to get away if the act is not intentionally wrongful. But I'm through. You're kind of my sounding board. I don't make you responsible because you didn't draft this. But I want it in the record and I want Senator La Grone to know what he's in for if they-- if this gets on the floor, and I'm very, very upset with this. So, Mr. Chairman, I'm through on this bill.

LATHROP [00:34:57] OK. I think that will do it. Thank you, Mr. Thompson.

BRIAN THOMPSON [00:34:59] Thank you.

LATHROP [00:35:00] Anyone else here as a proponent of LB324? Anyone here in opposition?

JOHN LINDSAY [00:35:25] Thank you, Senator Lathrop. Members of the committee, my name is John Lindsay, J-o-h-n L-i-n-d-s-a-y, appearing as a registered lobbyist on behalf of the Nebraska Association of Trial Attorneys in opposition to LB324. There is one reason for this bill that-- just one reason, and that is to protect people from their own carelessness, to relieve them of accountability for their actions. That's all the bill does. It-- don't think-- don't get distracted by the fact that it's next-generation 911, which is high-tech stuff. The companies that will bid on the contract are high-tech people. They're experts in the field. The reality is that the-- the doctrine of not-- of negligence has

developed over the last thousand-plus years and it's shown an ability to adapt to technology over the last thousand years. The standard is not that-- it's not difficult to understand. You have to do what a reasonable person in the same or similar circumstances would do. Now when we get into-- which, by the way, Mr.-- Mr. Warren mentioned, and I agree with him, it's important we do this right. But if we relieve folks of accountability for doing it right, is that really what we're-- are we really driving towards-- towards getting it right? I think this bills sends us the wrong direction. The-- the-- there was a discussion about fines keeping folks in order. I would argue that fines do nothing for the person who is-- who has lost life or limb due to the negligence of one of the folks who would be protected under this. They need to get their medical bills paid, etcetera, if they had-- if they did nothing wrong. I do want to point out this is a very broad grant of immunity. When you read especially page 2, the last portion of the-- of Section 1, it's very broad. It's immune from liability while providing-- performance of installing, maintaining, or providing next-generation 911 service. That means truck-- a truck heading to the next location runs a red light, there is no liability. Whoever gets hit, that's who covers their damages. And you can imagine any of these types of liability because it's very broad; it's anything they're doing; they don't have to do it carefully. That's all we're asking is that we maintain the standard of ordinary negligence and would ask that this bill not be advanced.

LATHROP [00:38:47] I see no questions, Mr. Lindsay. Thanks for your testimony. Anyone else here in opposition? Anyone in the neutral capacity? Seeing none, we do have two letters of support, one from Larry Dix with the Nebraska Association of County Officials and another from Julia Plucker with the Nebraska Cable Communications Association. And with that, Senator La Grone to close. Thank you, Mr. Chairman, members of the committee. And I think it's pretty clear that Mr. Lindsay's fears of this being advanced from committee are unfounded, although I would prefer that. This bill is about people. Like Senator Lathrop said, if you call 911, you need to know it's going to work. And if we can increase the certainty in that space of business, there's going to be more people who take part in that business, which is going to increase the competition. Now if businesses have to compete against other businesses, the level of service they provide is going to go up, which thereby would increase the level of service they provide to the people who rely on 911. So that's really who this is about is the people who rely on these services in emergency situations when they need them. So that's why I introduced the bill. Obviously I support the bill, but I would be happy to answer any remaining questions you may have.

LATHROP [00:40:06] Senator Chambers.

CHAMBERS [00:40:09] Senator La Grone, since you are the introducer of this bill, I'm going to tailgate on something that the Chairman mentioned. Would you want an airline to not-- to not be liable unless the pilot engaged in gross negligence?

La GRONE [00:40:29] No, Senator Chambers, I wouldn't, but I think that's a fair question because I think it gets to why this is a fundamentally different issue than an airline. And that is when we're using these services, these emergency services, there's obviously going to be a lot-- a very high amount of risk in that space because of the very nature of the situation. So when you have a lot of risk in a situation, you can increase competition in that space by bringing more certainty to it. So, no, I wouldn't want it in an airline scenario, but I think in this space, in an emergency space, it does make sense.

CHAMBERS [00:41:03] To try to give an example that doesn't require any technological jargon, suppose there are three wires that need to be put within a tube, in order for this particular service to be performed, and only two wires are put in. They wouldn't be liable for that under this, would they?

La GRONE [00:41:27] Well, I think it would depend on the circumstances surrounding the inputting of the wires.

CHAMBERS [00:41:31] Well, the guy who was putting them in had stayed up all night and he thought he'd put in three, but he only put in two.

La GRONE [00:41:41] Senator Chambers, I will say, while I am an attorney, I am not a tort or personal injury attorney, so I think that I don't know that I can effectively answer what a court might-- may or may not do in that situation.

CHAMBERS [00:41:53] I'm not talking about a court. I'm talking about the harm that may result to a person because this part of the system doesn't work at all and it's not detected until somebody makes the call and it doesn't go through, and then they get a number of calls that didn't go through and then they do some checking and find out that one of the components was not properly constructed. Would that be gross negligence?

La GRONE [00:42:21] Well, that's, again, something I think-- I would disagree that it's not for a court because I think that's the exact question a court would need to look at in a given case.

CHAMBERS [00:42:29] And you are comfortable with this standard?

La GRONE [00:42:33] Yes, because I think it provides more certainty for businesses in this space, and as I laid out, why I think it's different from other-- other areas that businesses operate in, that this could actually-- that-- well, I think the result, due to the increase in competition, would come forward--

CHAMBERS [00:42:50] Well, it's--

La GRONE [00:42:51] --as better services for the people who rely on these services.

CHAMBERS [00:42:53] I don't want a business just because they're cheap. I want a business that's going to make sure that the service they perform-- these issues can literally pertain to life or death. And to be this casual, this cavalier and say, well, if we hold them to a standard of being careful they might charge more for the service, so we're going to let them have a lower standard and they can be careless, you know that under this they can be careless and they wouldn't be liable, you understand that, don't you?

La GRONE [00:43:29] Well, I would disagree with the premise of your question that it is about cost because I don't think that's the only way businesses compete.

CHAMBERS [00:43:38] Well, let's forget all that. Let's deal with the standard itself. Under this, the installers, all these people who are going to have any role to play, in subsection (2) they can be careless, can't they, and not be held accountable? Isn't that true?

La GRONE [00:43:53] Well, the-- the-- the standard that they have to follow is laid out in subsection (2) as to what specifically that would involve in a certain case. That would be a question for a court to decide.

CHAMBERS [00:44:03] Well, here's what they're not going to be responsible for. They don't have to exercise ordinary care, reasonable care. They don't-- the care would be reasonable. They don't have to exercise reasonable care. They can be unreasonably careless. You struck "reasonable care." They don't have to be careless. You're telling them in the beginning, right at the beginning, you can be careless and you're not liable. Isn't that what this bill says?

La GRONE [00:44:38] Not in the traditional sense of those words. So as you know, these are standards--

CHAMBERS [00:44:43] Wait a minute, wait a minute. You're not going to get away that easily. Are you a lawyer?

La GRONE [00:44:45] Yes.

CHAMBERS [00:44:46] OK. You know what "reasonable care" means, don't you?

La GRONE [00:44:49] Yes.

CHAMBERS [00:44:50] What do-- when the law uses the term "reasonable," you understand what that means, don't you?

La GRONE [00:44:55] Generally, yes. Again, I'm not a tort lawyer so I'm sure that others could explain it better, but yes.

CHAMBERS [00:44:59] So if you excuse somebody from using reasonable care, you're telling them they can be careless and they're not liable.

La GRONE [00:45:05] That's where I disagree with you is that statement that you just said because I think that when a court looks at it, "reasonable care," as you know, is-- is a legal standard, as are-- as is gross negligence. And so I think flipping it and bringing in other terms, like being careless, isn't in that same realm of a legal standard. It's more of--

CHAMBERS [00:45:24] I don't think you understand me. We're not a court. We're a Legislature establishing policy and we don't want to leave it to a court to try to interpret words which have a clear meaning to anybody who reads them. These words say when you strike-- when the Legislature says the standard now is for you to be-- use reasonable care, it's not saying you have to be absolutely perfect. Reasonable care is a standard. "Reasonable" is in laws, whether they're criminal laws, civil laws, or whatever, so "reasonable" has an understandable meaning in the law. Legislators who deliberately strike that word "reasonable" is excusing people from exercising reasonable care. You wouldn't strike it if you were going to hold them to that standard, and that's what you're advocating, that we tell these companies in the beginning that we know you want to make a certain amount of money, so to get you to lower the price, you don't-- you don't have to use care. That's what you're telling them.

La GRONE [00:46:39] I disagree. Two points--

CHAMBERS [00:46:41] No [INAUDIBLE] that's all right. I don't to argue with you. Mine's on the record.

LATHROP [00:46:46] I think that will do it. Thanks, Senator La Grone. We appreciate you introducing LB324.

La GRONE [00:46:50] Thank you, Mr. Chairman, members of the committee.

LATHROP [00:46:52] That will close our hearing on-- well, is-- yeah, that's a close. That will close our hearing on LB324. The next two bills that were on our list are to be introduced by senators who are introducing bills somewhere else, so we will jump ahead to LB392, which is my hearsay bill.

MORFELD [00:47:10] OK. Senator Lathrop for LB392.

LATHROP [00:47:35] Good afternoon, members of the Judiciary Committee. My name is Steve Lathrop, L-a-t-h-r-o-p, and I'm the state senator from District 12, here today to introduce LB392. This is a bill that addresses an issue that was brought to my attention by my former law school professor, Collin Mangrum, from Creighton, and one of his

students, Chris McMahon. I believe they're both here today and will make themselves available. They're going to testify and talk about this issue in a little more detail, but it's an issue about our Rules of Evidence and where our state rules depart from the federal rules. What this bill does is bring a hearsay exception in line with Federal Rules of Evidence, as well as the rules in all, or most all, other states. Essentially, unlike the federal system or in other states, a witness's prior identification or their inability to make an out-of-court identification of a person in a photo lineup has been deemed inadmissible in Nebraska courts. And this cuts both ways. This is not a prosecution or a defense bill because it can be a problem for both. If someone fails to identify the perpetrator of a crime in a photo lineup, that failure cannot be raised by the defense attorney at trial, for example. This issue was made clear by a 2017 Nebraska Supreme Court decision in the case of *State v. McCurry*. And as far as we can tell, Nebraska is the only state which does not include this hearsay-- hearsay exception in our Rules of Evidence. Professor Mangrum and Mr. McMahon can go into more detail on this, and I'm happy to answer questions that you might have.

MORFELD [00:49:25] Any questions for Senator Lathrop? OK.

LATHROP [00:49:30] Seeing none, I'll stay to close, if I need to. Thank you.

MORFELD [00:49:34] OK. First proponent testimony. How many people do we have testifying on this bill? OK, great. Welcome.

CHRISTOPHER McMAHON [00:49:47] Thank you. Thank you, Mr. Chairman, Senators. My name is Christopher Mann; it's M-c-M-a-h-o-n. It was almost two years ago to this day that *State v. McCurry* was heard by the Nebraska Supreme Court. That case hinged on this particular Rule of Evidence. Now Nebraska codified the rules in 1974-75 time frame and we based them on the federal rules at that time. At that time there was a typo in the federal rules which we incorporated into our Nebraska rules. A few months later the federal system updated the rules and corrected the typo. Now two years ago, shortly-- shortly after the *McCurry* case concluded, I wrote an article for the *Creighton Law Review* about this particular rule, and I consulted with various subject matter experts on it such as Professor Mangram, who is here today. And I do want to point out one thing that Mr. Lathrop said. There's actually two states in the union, so Nebraska and North Carolina both have this typo incorporated. Now aside from Mr. Mangram, who is a professor at Creighton, I also worked with a professor at Duke Law School, Don Beskind, and he's a very familiar subject matter expert with North Carolina's laws. He regrets that North Carolina is also in this same situation. He-- he wished us luck in fixing it for Nebraska and said that if we do it, we'll actually leave North Carolina as the sole state in the union with this mistake on the books. One thing which I want to point out is in the *McCurry* case, so two years ago almost to the day, the Nebraska Supreme Court pointed to this particular mistake of law and in the Opinion, in *McCurry*, they actually pointed to a prior case, *State v. Salamon*, which is from '92, so-- so 27 years prior. That case, in the Opinion

the Nebraska Supreme Court stated that, look, this-- this is a typo, it is a mistake, but it is not for the Nebraska Supreme Court to correct this mistake; it is for the Nebraska Legislature. So that's a quote from 1992 from the Nebraska Supreme Court that has been repeated by many, many cases in the Nebraska court system over the years. So I just wanted to speak a little bit to the history of it. I think during the research for my paper, I worked with a lot of different experts on this. One was Mr. Thomas Riley, who is the chief public defender for Douglas County, and he was the attorney who was in charge for the defense in the McCurry case. And he pointed to the fact that, as Mr. Lathrop said, it truly is an agnostic rule, so it does not-- it harms both the prosecution and the defense. So this is something that has been many years in the making but we'd like to see set right in Nebraska. And that's all for me unless you have any questions.

MORFELD [00:52:36] Thank you, Mr. McMann. Any questions? OK.

CHRISTOPHER McMAHON [00:52:40] Thank you.

MORFELD [00:52:41] Seeing none, thank you. Next proponent testimony.

RICHARD MANGRUM [00:52:48] My name is Richard Mangrum. I'm-- I've been actually first published on this issue 30 years ago and actually talked to the attorneys and generated the Salamon case.

MORFELD [00:53:02] Mr. Mangram--

RICHARD MANGRUM [00:53:02] Yes.

MORFELD [00:53:03] --can you please spell your name for the record.

RICHARD MANGRUM [00:53:04] Richard, R-i-c-h-a-r-d, Mangrum, M-a-n-g-r-u-m, Mangrum.

MORFELD [00:53:04] Thank-- thank you.

RICHARD MANGRUM [00:53:11] This is kind of a nuance of the-- I don't think that was a typo. I think that's probably an incorrect analysis. But when they adopted the federal rules, they tried to decide between two types of approaches to hearsay. One was called the declarant-oriented definition of hearsay; one was called the assertion-oriented definition of hearsay. And there was a battle and the assertion-oriented definition of hearsay won, but the people who were concerned about this issue incorporated a compromise under what is-- under the federal rules would be 801(d)(1)(A), (B), and (C). And in those cases here's-- let me give you the context because most people, if you don't try cases, you may not see this. This case-- issue only comes up if the person who made the identification itself is in court subject to cross-examination. So you have the witness

who made the out-of-court statement in court, subject to cross-examination. And the question is whether you can get in a prior either nonidentification or identification in court during the trial. So they're in court, subject to cross-examination, which is one reason why states like Kansas don't-- they have-- they-- it's probably more conceptually difficult for this, but I'm just telling you, you have in court, subject to cross-examination, the person that made the identification testimony or this issue does not come up. The question only is, once they're in court, subject to cross-examination, can you ask them about whether they had previously identified someone? Now identification testimony is a very important part of many trials and criminal-- criminal cases, often turns on criminal cases. If you do not allow them to do that, you take it out of context. You take out-- their identification out of context. If they've seen someone in a lineup and then they come on in court and give identification testimony, the lineup may very well have influenced their in-court identification testimony, but you can't talk about that. It's incoherent. The rule is incoherent. It's-- it does not serve justice. I've said that for 30 years. And I'm probably more useful if you ask me questions.

MORFELD [00:55:25] OK. Thank you, Mr. Mangrum. Any questions? I don't see any, but I think that you made it clear and the-- the example is very helpful. Thank you. Next proponent testimony.

SPIKE EICKHOLT [00:55:46] Good afternoon, Senator Morfeld and members of the committee. My name is Spike Eickholt, S-p-i-k-e E-i-c-k-h-o-l-t, appearing on behalf of the Nebraska Criminal Defense Attorneys Association in support of the bill. An earlier version of a bill similar to this was introduced a couple of years ago, but it included some other provisions with respect to the Rules of Evidence and I think also maybe some discovery statutes, and so our association opposed that bill in its entirety. This bill is narrow-- more narrow and it just deals with a hearsay exception. Overall, it's true that making this exception for hearsay-- I guess it's not technically hearsay; it's redefining what is not hearsay-- would arguably benefit the state in some circumstances but it would also benefit our side of the equation in some of those circumstances. The current rule, I think, as some earlier testifier explained, sort of helps and hurts both sides, perhaps unfairly in some situations. The way that this works, I'll try to explain it and, I assure you, I'll be much more simple in my explanation than Professor Mangram. But right now, if a witness comes forward and he or she testifies to the identity of the defendant in a trial and that witness has identified somebody else before trial, either on the scene or in a photo lineup, we cannot ask about that. There is an exception to that that we can, and that is, if the person is there, we can, very limited, impeach them as to their in-court identification, or we can challenge just for a limited purpose that really this simply says to the jury, before today you identified somebody else, and that's it. We can't really go into the nature of that identification, who it was or anything like that, because it's just limited for impeachment purposes only. And it's kind of a narrow thing, and perhaps a jury doesn't understand it, but it ties our hands. What we cannot do now is, if there is a witness who is not brought to court but we know of that witness because the

police interviewed that person, showed that person a photo lineup and that person identified somebody else completely different than the defendant, we don't have the ability to bring that person in, put them on the stand, and question them as to their earlier out-of-court identification because that's not allowed under the rule. The McCurry case was a case that Mr. Riley did defend. Mr. Riley made an argument in front of the Supreme Court that basically-- that was a constitutional argument that we had a due process right to bring in this evidence, and the Supreme Court said, essentially, no, you don't, it's a Rule of Evidence, the Legislature can fix it, they haven't and they haven't done it since 1992 when the court ruled on a similar type of argument. So at this point, the association took a position that we should support this change because it has-- the present rule has hurt us in a number of circumstances, and some of our clients, and we would support the change to sort of bring us consistent with other jurisdictions. Thanks.

MORFELD [00:58:40] Thank you, Mr. Eickholt. Any questions? OK, seeing none, thank you. Next proponent testimony.

TIM HRUZA [00:58:51] Good afternoon, members of the Judiciary Committee. My name is Tim Hruza, last name spelled H-r-u-z-a, testifying in support of LB392 on behalf of the Nebraska State Bar Association. I am far from a subject matter expert in this area, and I don't know if I have much to add to the testimony of those that came before. The Bar Association looked at this legislation. Our legislation committee is made up of both prosecutors and defense attorneys and after some discussion on the bill, we determined to support the bill as it would bring us consistent with how-- how this area of the law, with respect to hearsay, is treated both on the federal level and in courts across the country. Again, I would just echo a lot of the sentiments of those who have spoken before me. We would ask for your support for LB392 and we thank Senator Lathrop-- Lathrop for bringing the legislation.

MORFELD [00:59:43] Thank you, Mr. Hruza. Any questions for Mr. Hruza? Seeing none, thank you.

TIM HRUZA [00:59:50] Thank you.

MORFELD [00:59:50] Do we have any opponent testimony? Anyone in the neutral capacity? OK. Seeing none, Senator Lathrop waives. We have no letters on the record for this bill.

PANSING BROOKS [01:00:23] OK. You're on top of it, of course.

LATHROP [01:00:23] Senator Pansing Brooks is back, so with the close of LB392, we will next go to LB517 and our own Senator Pansing Brooks.

PANSING BROOKS [01:00:32] Thank you, Chair Lathrop and fellow members of the Judiciary Committee. For the record, I am Patty Pansing Brooks, P-a-t-t-y P-a-n-s-i-n-g B-r-o-o-k-s, representing District 28 right here in the heart of Lincoln. I appear before you today to introduce LB517 which allows a court to increase the award of damages to a plaintiff who prevails in a civil action brought pursuant to the Human Trafficking Victims Civil Remedy Act to an amount that bears a reasonable relation to the actual damages which have been sustained. Actual damages may include costs of medical and psychological treatment, transportation, temporary housing, childcare, relocation expenses, property damage, income loss, and other damages which a trafficking victim may incur. In past years, our Legislature has tackled human trafficking head-on. In 2015, we expanded definitions. In 2016, we provided for legal immunity from prostitution charges for victims of human trafficking. In 2017, we imposed tougher sentences on sex buyers and traffickers in order to decrease the supply and demand of sex trafficking victims and bring violent criminals to justice. In 2018, we passed a bill to allow survivors to access a process as-- by which they could come forward with a conviction they received as a result of their being trafficked and to have that conviction set aside and those records sealed. Due to last year's legislation-- due to last year's legislation and our preceding work, I'm happy to report that Nebraska was recently ranked number one in the nation by the Polaris Project in providing criminal record relief for trafficking victims. The Polaris Project is the gold standard for measuring success in combating human trafficking. We received a B, a letter B for our-- for our trafficking work, and the closest-- the next-closest state was a D and the rest were Fs, so we have done a lot of great work as a legislative body and with many others to combat this hideous criminal practice. This year we have several bills focused on improving resources available for survivors to help them get back on their feet, move forward with their lives, and feel comfortable working with law enforcement in order to catch and arrest purchasers and buyers. LB517 is part of this important next step of supporting survivors in our trafficking work. Current law allows a trafficking victim who has suffered personal or psychological injury as a result of such trafficking to bring civil actions against anyone who knowingly engaged in trafficking of such victim or aided or assisted with the trafficking of such victim within the state. Victims may recover "actual damages." What LB517 does is to delineate what some of those "actual damages" can look like. It gives the courts greater clarity in providing these civil damages and how to award damages in a more fair way. We need to keep in mind that damages that a survivor experiences is very-- they are very hard to quantify. How do you really put a price tag on repeated rape and abuse? These survivors suffer far worse and are more traumatized than most of us can even imagine, so our statutes can never fully reflect the totality of the suffering, but what we can do is give greater meaning and clarity to the phrase "actual damages." We know that those who engage in this abhorrent practice of trafficking are often people who have either accumulated their own wealth through the sale of human flesh or have created a higher demand for trafficking victims by paying exorbitant sums of money. It is only fair that our statutes be clearer in order that survivors can recuperate damages they have suffered from those who have caused such significant suffering. It is my hope that by specifying

these damages in civil statutes, that we are also providing a framework to better assess the damages for criminal violations. We're way past the misconstruing human trafficking as the oldest profession in the world, as we've always called it, merely between two consenting adults, and what we now realize, that it is actually the oldest myth in the world with the victim being subject to force, fraud, and/or coercion. Our understanding of human trafficking has undergone a seismic shift, thankfully. So I want to thank Professor Ryan Sullivan, who is here today, and his University of Nebraska law students for their work on this bill. I also want to thank Professor Sullivan for his continuing work on the Clean Slate Project, which works with Nebraskans who are seeking a fresh start-- a fresh start to clean up their past criminal history. Professor Sullivan and some of his students will be offering testimony today. I also want to thank the Governor, the Attorney General, the Women's Fund, UNL, Creighton, the Catholic Conference, the Nebraska Family Alliance, and many others, including this Legislature, for their willingness to work with me and to collaborate on all these significant changes to human trafficking through the years. These changes have definitely taken a village. So in that, I ask you to advance LB517 to General File and I'm happy to answer any questions.

LATHROP [01:06:07] I do not see any questions, Senator.

PANSING BROOKS [01:06:10] Thank you.

LATHROP [01:06:11] Thank you for that introduction to professor. Welcome back. By the way, I think we passed your shoplifting bill.

RYAN SULLIVAN [01:06:18] I heard, I heard. We celebrated--

LATHROP [01:06:21] Pretty happy about that.

RYAN SULLIVAN [01:06:22] --celebrated that.

LATHROP [01:06:22] I think everybody on Judiciary Committee felt good about that.

RYAN SULLIVAN [01:06:24] That went through pretty--

LATHROP [01:06:25] Great work by your group.

RYAN SULLIVAN [01:06:26] --pretty slick. Thank you. Thank you. Chairman Lathrop, members of the committee, my name's Ryan Sullivan, R-y-a-n S-u-l-l-i-v-a-n. I'm assistant professor of law at the University Nebraska College of Law where I teach in the civil clinical law program and I supervise the Clean Slate Project, testifying today as a citizen and not on behalf of the university. Clean Slate Project, as the senator mentioned, works with low-income Nebraskans and military veterans who struggle to obtain housing and employment as a result of their criminal history. This last year, we worked with Senator

Pansing Brooks to expand our program to support survivors of human trafficking who acquired a criminal record as a result of their victimization. This last semester, we worked with Senator Pansing Brooks's office to draft the language that became LB517. As the senator explained, this bill seeks to improve the existing statute and it does so in two significant ways. First, it provides the court flexibility and discretion to assign a dollar amount to the types of damages that are not easily quantifiable. Unlike a traditional personal injury matter where a court or a jury can use, for example, medical expenses as a factor to quantify and compute actual damages, there is no similar factor that can be used to quantify the compensation that one is due for damages suffered from having been enslaved and repeatedly raped. Secondly, the bill provides guidance on the types of actual damages that a victim may suffer. The purpose of this guidance is to educate judges and attorneys on the unique types of harm suffered by the victims of the sex trafficking trade. An underlying purpose of these amendments is to provide adequate incentive for attorneys and law firms to take on these types of cases. These types of cases are notoriously difficult and expensive to litigate, and the damage amounts upon which attorneys' fees are typically based are uncertain and difficult to quantify. I believe these changes result in more victims having access to this relief because more attorneys are going to be willing to assist them in pursuing these claims. And just as important, the relief available will be more in line with the actual damages suffered because attorneys will know what damages to seek. This is a unique area of law. This is a new statute. And judges and juries will better understand the type of damages that may be considered in determining how much the trafficker must pay to the survivor for the trauma and harm that's been inflicted. I think these are pretty small changes that can have a really big impact, and I encourage you to advance this bill.

LATHROP [01:09:14] Very good. I do not see any questions for you, but thanks for being here again.

BRANDT [01:09:21] Excuse me.

LATHROP [01:09:22] Oh, I'm sorry. Senator Brandt.

BRANDT [01:09:22] Thank you, Chairman Lathrop. Thank you for-- Professor, for bringing this. And this may be a little naive on my part, but lines 28, 29, and 30 in here, everything else, to me, you can put a value on. How do you put a value on sexual servitude engaged in by the victim while in the sex trafficking situation?

RYAN SULLIVAN [01:09:44] You know, that's a-- that's a very interesting question and we actually had a conversation about that with the students today in preparation for this, this hearing. Subdivision (c) was-- was drafted in a particular way to give the court a lot of latitude and flexibility. At the bare minimum, as-- you know, to put it bluntly, minimum wage is available, right? That's going to be the bottom. You've got a Fair Labor Standards Act. But at the top end, you give the judge that flexibility to have-- bring in for

the court-- for the plaintiff's attorney to bring in witnesses, to bring in evidence to be able to establish what that value may be. You know, in the middle you have a quantifiable amount that, if they're able to identify, if you have this-- you know, for lack of a better word, pimp, the trafficker keeps good books, who knows? They may know what the gross revenue was and so they can identify it there. But absent that, the plaintiff's attorney is going to be able to provide, have an opportunity to provide evidence to identify that value. And I think that is really-- would be the most ideal way to do that because that's going to give the court some flexibility under that circumstances to come up with an amount that's-- that's fair. And I don't think there would be a way to do that precisely because it's not a-- because of it-- because it's in a slavery environment, it's not a market environment, and so you don't know what the actual market value of something is.

BRANDT [01:11:24] All right. Thank you.

LATHROP [01:11:27] Professor, I'm going to take a couple of minutes with this one. So I'm reading the bill, and as originally prepared and as current law, paragraph (2) says a plaintiff who prevails in a civil action brought pursuant to the Human Trafficking Victims Civil Remedy Act may recover his or her actual damages plus attorney fees and costs reasonably associated with the civil action. The new language: The court may, in its discretion, increase the award of damages to an amount which bears a reasonable relation to actual damages. And I'm wondering if you have a-- imagine, let's say, we find somebody that's not judgment proof but somebody who is actually a proper target, and maybe that's somebody running some kind of a business where this sex trafficking is happening and who has the means to pay a judgment. You would bring a suit under this act, you'd go to trial, you'd put on your evidence, and then the jury would be instructed on the liability, right? In-- in a jury instruction, in a civil action, there is the damage instruction: You may consider the following as you-- as you determine damages for the plaintiff, in this case, if you find liability to be present. It's a typical tort case; medical expenses, future medical expenses, lost income, you know, pain and suffering, or-- or loss of enjoyment of life and those types of things, they're laid out in a jury instruction. And this bill looks like you go through that process, you get done, the jury comes back, they give you a number, and now the judge engages in some postverdict addition of more damages. And at that point, are we denying somebody the right to a jury trial?

RYAN SULLIVAN [01:13:25] I don't-- I mean, in a-- in a sense. I don't think you're denying the-- a plaintiff right to a jury trial because the jury is still going to determine--

LATHROP [01:13:38] The defendant.

RYAN SULLIVAN [01:13:40] The defendant-- oh, where-- are you denying the defendant a right to--

LATHROP [01:13:41] So you've given him-- you've given the plaintiff a crack at him on actual damages, and then when you get done you say to the defendant, OK, hang on, we got round two, and now the judge is going to add on to that. A jury is not going to do it. Jury has already decide what your actual damages are. But I'm going to add on more in my judgment as the judge because the Legislature told me to; now I got to try to quantify these things. Would not this bill be better if we just simply said-- took existing law and said actual damages include the following, have this list in here, and then the jury can be instructed to look at these items in coming up with their dollar amount.

RYAN SULLIVAN [01:14:25] You know, I think that would be one way to consider it. I'll tell you, this language, we looked at liquidated damages; we looked at some different options. We-- we wanted to find something that was already in existing Nebraska statute and this is almost word for word out of the Consumer Protection Act.

LATHROP [01:14:41] Is it?

RYAN SULLIVAN [01:14:42] Right.

LATHROP [01:14:42] I'm thinking that the model may be something closer to the wrongfully incarcerated, because who can put a dollar amount on that, right? Somebody that's been put in jail, like the Beatrice Six, for example, you have a jury trial and a-- and a-- and a jury can determine, if these are the elements of damages, what the value of that is. But I don't know that we can take the-- from a defendant's point of view, I don't know that we can say you don't get a jury on any of these damage issues, they're going to be decided strictly by a judge.

RYAN SULLIVAN [01:15:18] And I don't-- and I don't have a clear answer for that. It's something I hadn't-- I hadn't considered and thought forward through. The-- where-- as I said, where we took this from was Consumer Protection Act. We thought that was a similar situation where it was going to be very difficult to identify and quantify the types of damages that are harmed by a consumer.

LATHROP [01:15:40] Right.

RYAN SULLIVAN [01:15:40] And so we used that here.

LATHROP [01:15:40] I would think a jury would get going with this kind of evidence, like I think I-- if I'm going to try this case, I think I'd like it in front of a jury and have them instructed that these are the elements of damage for someone who has been the victim of sex trafficking--

RYAN SULLIVAN [01:15:56] Sure.

LATHROP [01:15:56] --because after they hear everything this guy or this company did with these people to be liable, I think I'd rather have a jury decide that but--

RYAN SULLIVAN [01:16:06] I think that would remain within the spirit of-- of the intent here was to just not-- to not tie the court's hands or-- or even the jury's hands to be able to-- to be stuck with what's very easily quantified, the medical expenses, the lost wages, and so forth.

LATHROP [01:16:22] Right. So in tort cases, you try them, the jury is instructed on liability, and then they're told, if you find that the plaintiff has proven all the elements of their claim, then you shall award damages and the damages are the following, and typically it's medical expenses, which you could have in this case, and a number of things. But you would then just add these things into the jury instruction and let them go.

RYAN SULLIVAN [01:16:47] I think it would be very reasonable as long as there was-- as long as there was language that, again, captured the spirit of the-- of the-- the concept was to really broaden the perspective of both attorneys and courts in thinking about what is-- what-- how do you quantify the damage of rape. And I think your comparison to wrongful convictions is actually spot on.

LATHROP [01:17:11] Right. OK. And we've already seen those can result in some pretty big verdicts. I don't see any other questions, but thank you once again for being here today.

RYAN SULLIVAN [01:17:35] Thank you.

LATHROP [01:17:35] Good afternoon.

MIKE HANNON [01:17:36] Good afternoon, Chairman Lathrop and members of the committee. My name is Mike Hannon, M-i-k-e H-a-n-n-o-n. I am a senior certified law student at the University of Nebraska College of Law and I'm enrolled in the civil clinical law program. I am testifying in favor of LB517 as a citizen and not as a representative of the university. Nebraska law currently allows for the victims of human trafficking to pursue relief in the form of civil damages through the Human Trafficking Victims Civil Remedy Act. LB517 seeks to provide victims improved ability to seek redress from their traffickers. In its present form, the current statute allows victims to seek actual damages plus attorney's fees and costs, thus making Nebraska one of 40 states to allow such remedies for trafficking victims, yet the civil-- the civil remedies available to a victim of human trafficking under the statute in its current form are inadequate. LB517 aims to expand the types of civil remedies that can be afforded to victims by adopting statutory language consistent with those found in the Consumer Protection Act. Similar to the present form of the current statute, the Consumer Protection Act allows an injured person to recover the actual damages sustained, attorney's fees, and costs; however, the

Consumer Protection Act goes further by giving courts discretion to increase the award of damages to victims. This discretion may be exercised by increasing a damages award to an amount that bears a reasonable relation to the actual damages sustained when those damages are not easily measurable by ordinary standards. It is this standard that LB517 seeks to adopt for the victims of human trafficking. Victims endure a multitude of abuses resulting in economic losses, including unpaid wages and overtime. This is in addition to the noneconomic losses as a result of the unimaginable pain and suffering victims endure. To put it bluntly, how would one measure and prove the-- the dollar amount of damage resulting from having been repeatedly raped? Unfortunately, our legal system can never fully vindicate victims of this horrific practice; however, we must do all we can to ensure all preventative and compensatory mechanisms are in place to combat human trafficking in this state. The additional measure of damages sought by this bill is important because the quantifiable damages provable by victims under the current statute are often inadequate to provide reasonable compensation, especially where Nebraska does not provide for punitive damage as other states do. For example, Montana, Tennessee, Alabama, and the uniform act on civil remedies all provide that a victim may seek punitive damages. Because of Nebraska's unique stance on punitive damages, victims within-- within the state are not able to seek the same relief that they otherwise would in other states. Importantly, this amendment adopts a framework already in place within the Consumer Protection Act and seeks to close the gap between the measure of damages in other states without running afoul of Nebraska's prohibition on punitive damages. LB517 is a sensible addition to Nebraska's effort to combat human trafficking and I urge the committee to advance this bill and bring it to the floor for the Legislature for a vote. Thank you.

LATHROP [01:20:45] Thank you for your testimony and your work on the issue.

MIKE HANNON [01:20:51] Thank you.

LATHROP [01:21:02] Good afternoon.

NICHOLAS McGRATH [01:21:06] Good afternoon. Chairman Lathrop and members of the committee, my name is Nicholas McGrath, N-i-c-h-o-l-a-s M-c-G-r-a-t-h. I'm a senior certified law student at the University of Nebraska and I'm enrolled in the civil clinic program. I am testifying in favor of LB517 as a citizen and not as a representative of the university. One of the bedrock principles of our legal system is that a remedy should be crafted so as to make a litigant whole. The civil remedies for victims of sex trafficking in Nebraska are currently insufficient to safeguard this principle. The current state of the law stems in part from a Nebraska Supreme Court interpretation of Article VII, Section 5 of our state's constitution. This section has been interpreted as establishing a general bar on the award of punitive damages to private litigants. Consistent with this interpretation, victims of sex trafficking in Nebraska may bring civil actions against their traffickers, but their recovery is limited to their actual damages and attorney's fees; in

other words, a victim may only seek compensation for the financial damages stemming from their time in sexual servitude. No mechanism exists for these survivors to be compensated for the most traumatic and damaging aspect of their ordeal, the emotional and psychological pain inflicted at the hands of their abusers. LB517 provides a means for recognizing and compensating these damages of a nonpecuniary nature without offending the Nebraska Constitution. LB517 unties the hands of our courts to more adequately compensate survivors. Where current law limits compensation to readily identifiable and quantifiable damages, LB517 provides courts the authority to increase the award of damages in recognition of what is often the most significant injury sustained by survivors, that which is intangible and not easily assigned a dollar figure. The remedial scheme created by LB517 does not violate the Nebraska Constitution because it does not establish punitive damages. Awards under the bill are not intended to punish traffickers; they are intended to compensate survivors. The aim is to make the victim whole, not to punish the offender. Civil remedy statutes are a valuable tool at the disposal of survivors seeking justice. Civil actions facilitate survivor autonomy and can be an effective tool for survivors to reclaim control of their lives from their trafficker. I urge you to make Nebraska's civil remedy statute complete by providing compensation for the most significant and long-lasting harm caused by sex trafficking. I urge you to advance LB517. Thank you.

LATHROP [01:24:00] Have you been working on this awhile, Mr. McGrath?

NICHOLAS McGRATH [01:24:03] Me, personally, I have not been working on it for-- for all that long. But the clinic and prior student teams have been involved with the-- the research and the drafting of this legislation.

LATHROP [01:24:15] I'm just wondering what the elements of this tort are. If you're going to bring a civil action against somebody, I get that it says any-- any trafficking victim may bring an action against someone who knowingly engages in human trafficking of such victim. So are the elements of the cause of action (1) you've got to have somebody that's engaged in human trafficking, (2) they got to make this person the victim?

NICHOLAS McGRATH [01:24:47] Right. So essentially, as far as stand-in goes for-- for who can bring the action, it would be a victim of-- of sex trafficking or a parent or legal guardian. So that would be who would have standing to bring this action. And then it would be anyone who is engaged in human trafficking or aided and assisted with-- with human trafficking. So that kind of goes to-- to your statement earlier about being judgment proof. If-- if we had a hotel or motel that was knowingly facilitating this process, that-- that would be someone who could be a party to an action like this.

LATHROP [01:25:25] Oh, boy. Those are a lot of damages for the hotel. They'd have to knowingly--

NICHOLAS McGRATH [01:25:36] They would have to be knowingly aiding or assisting with the human trafficking of the victim.

LATHROP [01:25:41] OK, good. Wondered where you were going to get your defendant at. All right. OK. Thank you. Any other proponents?

CRYSTA PRICE [01:26:04] Members of the--

LATHROP [01:26:05] [INAUDIBLE]

CRYSTA PRICE [01:26:05] Yeah? And I can-- good afternoon. My name is Crysta Price, C-r-y-s-t-a P-r-i-c-e. I am the director of the Human Trafficking Initiative at Creighton University and the founder of HTI Labs. I work with the Nebraska Human Trafficking Task Force. So I've been working on this issue for about six years. I'm here not to provide any legal analysis of the bill. I think everyone before me did a great job on that. But I am providing testimony from the Women's Fund and from a group of survivors who are unable to be here today. Sakura Yodogawa-Campbell, Molly Nocita, and Rachel Pointer, founding members of Thriving Warrior and survivor leaders in the fight against human trafficking in Nebraska, have provided joint written statement of support due to being unable to testify today in person. As survivors of human trafficking, we stand in support of LB517. We recognize the importance of expanded options for survivors such as ourselves to pursue damages and expenses civilly. Healing from complex trauma such, as what is induced upon us during the course of our exploitation, is a long and expensive journey. LB517 sends a message to the victims and survivors that our suffering is valid and we deserve to be able to pursue civil relief. We urge you to join us in sending this message of hope by advancing LB517. And I've submitted my testimony to you guys along with testimony from the Women's Fund of Omaha. The only thing that I will add is, to the point earlier about the-- the value, the dollar amount, one of the things that we study is the on-line commercial sex market, and I just want to say that the amount of money that's being made here is extreme. The hourly rate tends to be about \$300 an hour on the sex trafficking side, and that's on the lower end of the market, with multiple appointments a day. So there's a lot of-- of money that they're not seeing, outside of the fact that they're being forced into that. And then as a part of the task force, I'll just say that what happens after the exploitation, to what the survivor said, it's a long journey and it involves a lot of support services, therapy; often there will be some-- some substance abuse-- substance abuse issues. And so it is a long and expensive road, and I think that LB517 would go a long way in helping make that possible. Thank you.

LATHROP [01:28:39] OK. I don't see any questions, but thank you for your testimony. Oh, I'm sorry. Senator Brandt.

BRANDT [01:28:43] Thank you, Ms. Price, for testifying today. Is this similar to what other states have in law right now?

CRYSTA PRICE [01:28:53] Yes. Yeah, I think like 33 or so that we looked at have more expansive versions than our current statute.

BRANDT [01:29:00] OK. So there would be a template to follow in other court proceedings to see how these damages would be awarded?

CRYSTA PRICE [01:29:08] Yeah, and I think that's probably what they would be working on, but yeah.

BRANDT [01:29:11] All right. Thank you.

LATHROP [01:29:14] I see no other questions. Thank you for being here today.

CRYSTA PRICE [01:29:16] Thank you.

LATHROP [01:29:18] Other proponents of LB517? Any opponents? Anyone in the neutral capacity? Wait, we got somebody, Senator.

PANSING BROOKS [01:29:38] Oh, sorry.

JOHN LENICH [01:29:38] Just quickly.

LATHROP [01:29:38] Good afternoon.

JOHN LENICH [01:29:39] Good afternoon, Senator. my name's John Lenich. I teach civil procedure at the UNL College of Law, although I'm here today in my capacity as an individual and not as a representative of the university. I have to admit I have not read the bill, but I was listening with-- with interest to the exchange about the right to jury trial and that I wanted to at least encourage the committee and the proponents just to take another look at that section to make sure it's OK because normally how we determine whether there's a right to jury trial is under the Nebraska Constitution and its historic-- the primary test is historical. For example, there's no right to jury trial against the state because years ago you could not get a jury trial against the king. And when we're determining whether there is a right in civil actions, it's primarily a function of whether the action would have been equitable way back when or a legal action way back when. And for statutory causes of action, the general approach is to analogize it, at least look to history: Is this kind of like something that would have been a law action way back when or an equitable action? And as I've listened to the description, and again I want to underscore I'm-- I haven't read the bill, it sounds like this is analogous to what would historically be a tort action with compensatory damages. And that-- that would clearly, I think, or at least strong argument could be made that implicates the Nebraska constitutional right to jury trial. And at least what I heard of your proposal, Mr. Chairman,

about trying to turn those factors into-- give it to the jury as part of the instructions, I think that would eliminate any question about whether we have any-- any constitutional deficiencies in the bill. But again, like I said, this is just sitting here listening to the conversation and-- but I thought at least it was worth bringing it to the attention of the committee. Thank you.

LATHROP [01:31:46] Yeah. No, I appreciate that. I think we have you lined up on another bill, don't we?

JOHN LENICH [01:31:49] Yes, sir.

LATHROP [01:31:50] Yeah. But thanks for your testimony.

JOHN LENICH [01:31:52] OK.

LATHROP [01:31:53] I appreciate your observation.

JOHN LENICH [01:31:54] You're welcome.

LATHROP [01:31:54] I don't see-- oh, wait a minute. Senator Morfeld has a question for you.

MORFELD [01:31:58] More of a statement. I just wanted to say welcome, Professor Lenich. I was just gossiping with Senator Slama about how fun your classes were and how you scared the crap out of me several times.

JOHN LENICH [01:32:09] [LAUGH] I don't know whether I should say you're welcome or not.

LATHROP [01:32:13] Very good. Thanks for being here.

SLAMA [01:32:15] Oh, I'd also like to second that sentiment. [LAUGHTER]

LATHROP [01:32:22] Any more neutral? Seeing none, we do have letters of support from Marcia Blum at the Nebraska-- pardon me, National Association of Social Workers; Sherry Miller, League of Women Voters; Ryan Sullivan, Marie [SIC] Monroe and Sami Schmit. And with that, Senator Pansing Brooks, to close.

PANSING BROOKS [01:32:45] Thank you. Well, I-- I didn't have Professor Lenich but now I'm scared, so-- [LAUGHTER] So anyway, thank you to all who came and testified. Just as a reminder, civil actions already exist under "actual damages." What happened is I've been working on this, as you know, for five years now and, you know, I-- I've really been trying to-- I-- I called Professor Sullivan in the law school because I keep thinking there

ought to be some RICO damages that we could-- we could bring to bear, because what's happening is that these victims are so traumatized and, you know, we have-- we have had instances where people go, well, what's the problem, it's just two people having sex, what-- what could be the damages? So that's why we couldn't get to a point where we could figure out-- my-- my goal was to have RICO damages and give one third to law enforcement to encourage them to make the arrests and one third to the survivors and then one third to providers to help with-- with all the needs that the survivors have. That was my long-term goal. So I called in Professor Sullivan and his students and basically all fall we just could not figure out a way to do it, especially in light of the fact that right now the-- the punitive damages act as sort of a roadblock, which I think is something else we ought to consider attacking at some point. But anyway, as we discussed it, we saw that the Consumer Protection Act had a similar method to allow judges to understand there's something more than--- that we could delineate and-- and more clearly create a-- a grouping of damages which could be considered by the judge. I'm happy to bring an amendment to have the jury instructions include something like this to be a broader perspective. And again, you mentioned-- the hospitals came up. Clearly the Attorney General and the city of Omaha, the city of Lincoln, they are all doing training of-- of hospitals, of hotels, to be able to identify and work with law enforcement on identifying and recognizing trafficking. And they have connections set up because they're on the front line of this-- of this hideous issue. So again, I'm happy to work with you all on this. If you can help me think of a way to do RICO damages, I would love that, but I do think it's important. What I was really bringing this bill was to allow people to understand a broader perspective of the damages, and it's not just somebody having sexual intercourse. This is a much more hideous and much more hurtful type of harm that occurs to these victims.

LATHROP [01:35:43] It's also more than just sexual, like we just had a raid up in O'Neill, right--

PANSING BROOKS [01:35:48] Exactly--

LATHROP [01:35:49] --for labor trafficking.

PANSING BROOKS [01:35:51] Yes, it is, so. And of course, remember, it's force, fraud, and coercion when trafficking is involved and the plaintiff is pursuant, as the bill says, to the-- the Human Trafficking Victims Civil Remedy Act. So it talks about the actual damages there. I just went on to say what those damages could include.

LATHROP [01:36:13] Right. Good.

PANSING BROOKS [01:36:14] Thank you.

LATHROP [01:36:15] I think we can work with that.

PANSING BROOKS [01:36:16] Thank you.

LATHROP [01:36:16] Thanks, Senator. That will close our hearing on LB517. And Senator Wayne is still over in the Appropriations Committee, so we will move ahead to LB308. That's a Lathrop bill.

MORFELD [01:37:25] OK, Senator Lathrop, LB308. Senator Lathrop, LB308.

LATHROP [01:37:37] All right. Good afternoon, Judiciary Committee members. My name is Steve Lathrop, S-t-e-v-e L-a-t-h-r-o-p, and I'm the state senator from District 12. I'm here today to introduce LB308. I brought this bill at the request of the bankruptcy practice section of the Nebraska State Bar Association following a Nebraska Court of Appeals decision in August of 2018. The Appeals Court ruled in Bayliss v. Clason that the filing of a suggestion in bankruptcy in a civil matter constitutes a general appearance in the civil matter. While this may seem like a simple finding, the implications have given rise to a number of concerns from those who practice in the area of bankruptcy law. The filing of a suggestion in bankruptcy has historically been made by a bankruptcy attorney in a civil matter for which the attorney was not necessarily retained to represent the client; in other words, a client may have a couple of cases going on and the bankruptcy lawyer is notifying the other pending cases that there is a suggestion in bankruptcy, but they don't represent that person in the other cases. The filing of a suggestion in bankruptcy is meant to put the court and litigants on notice in a civil matter that the matter must be stayed or stopped pending the outcome of the bankruptcy. With the court's decision in Bayliss, practitioners do not-- practitioners who do not represent the clients in civil matters have concerns about the impact of making a general appearance and waiving important defenses that a defendant might have in other civil matters. Section 2 of LB308 addresses this problem and makes it clear that the filing of a suggestion in bankruptcy does not constitute a general appearance and that those potential defenses are preserved. Section 1 of the bill is drafted to address time lines for service requirements to resolve concerns about the impact of a bankruptcy stay in a civil matter prior to service being completed. LB308 was drafted by members of the Nebraska State Bar Association who practice in this area with the assistance of Professor John Lenich at the University of Nebraska College of Law. Professor Lenich and a representative of the Bar Association who practices in the area of bankruptcy law are here today and can better explain the drafting of the bill and the implications of the court's decision in Bayliss. I'm also happy to answer any questions that you might have. I thank you for your time and ask you for your support and suggest that if these guys can do it in three minutes or less, I'll be very impressed. I read the Bayliss Opinion and I understand the problem. I read the professor's memo and I-- I get it. I think we're doing the right thing here. But there's a lot of moving parts and I'll let them explain that, unless you have questions. Senator Brandt.

BRANDT [01:40:40] In-- in practical terms, in layman's terms, can you give me an example of what we're trying to do here?

LATHROP [01:40:47] Yep, I sure can. So let's say that I'm a bankruptcy lawyer and the bankruptcy code requires that if there is other pending litigation, I as a bankruptcy lawyer need to notify those other courts around that this-- my-- my bankruptcy client might be involved in, notify them that there's a stay. So as soon as you file a bankruptcy, there's an automatic stay and you need to notify people. Oftentimes it's bill collectors and people like that. But it might be-- it might be other litigation. If you're a corporation, it could be a lot of different types of pending litigation. Once the court in an unrelated case knows that there's a stay, they have to stop that case. Sometimes they stop it even before the defendant has been served. OK? So let's say that you got a second cause of action going on somewhere and you're trying to get service on the defendant but you haven't gotten service yet and now the bankruptcy lawyer sends notice that the-- the bankruptcy has been filed and that there is a stay. You can't even serve the defendant once there is a stay; you have to wait--

BRANDT [01:41:59] OK.

LATHROP [01:42:00] --until all the bankruptcy has been resolved or at least you get leave of the court and in the meantime, the deadline to serve the defendant may have passed. And so what we're doing is addressing the fact that when I file a stay in that civil action, I am not entering a general appearance would which would preclude me from coming in later and saying you didn't get service on me, I don't have sufficient contacts with the state for you to be suing me here, any of those kind of jurisdictional types of defenses. That's what the court held in this case. And what we're going to-- what we're going to do with this is filing a stay doesn't mean I waive the-- the right to come in in that other civil proceeding later on and say I've got an issue with even being sued in this state, I don't have sufficient contacts, or you don't have jurisdiction over me for one reason or another. And that, Senator Brandt, would take us into freshman year of-- of civil procedure. I'll just tell you that's an issue. And once it gets stayed, if-- if you haven't served the defendant, you get six months to serve a defendant in Nebraska; if your case is stayed for nine months, your chance to-- to get service has passed. And so the bill deals with both things. The filing of a stay is not the same as a general appearance; once the stay is lifted, I can still argue that you can't sue me here. And the other piece is if my opportunity to get you served as the defendant in that case has expired while the stay is pending, then we allow for more time to do that.

BRANDT [01:43:40] All right.

LATHROP [01:43:40] I think I've made it as simple as I can or as simple as a tort lawyer can, realizing this is more the realm of the bankruptcy guys and you're going to hear

from two of them that understand it. Any other questions for Senator Lathrop? OK. Seeing none, first proponent testimony.

PAUL REA [01:44:05] Good afternoon. My name is Paul Rea, P-a-u-l R-e-y. I'm a bankruptcy attorney of over 2-- for 26 years now. I'm here today on behalf of the bankruptcy section the Nebraska State Bar Association to speak in favor of LB308. As the senator so eloquently stated, there's a problem created by the Nebraska Court of Appeals in Bayliss v. Clason. Again, most of what he has said is much of what I was going to say, so I'm kind of without anything to talk about, which is actually a good thing because I get rather nervous. I guess my question is, do any of the senators have any questions about bankruptcy and how that proceeds?

MORFELD [01:44:49] Are there any questions for Mr. Rea?

WAYNE [01:44:49] Yeah, I got one.

MORFELD [01:44:50] Senator-- Senator Wayne, for a question.

WAYNE [01:44:55] So I'm thinking about getting into bankruptcy. Can you walk me through how to start a case?

PAUL REA [01:44:59] Sure. What you--

WAYNE [01:44:59] No, no. I'm joking, don't worry.

MORFELD [01:45:01] Some free legal advice.

PAUL REA [01:45:02] Hopefully not on a personal level. What you're looking at is you've got a mound of debt that you just--

WAYNE [01:45:07] I was joking. You don't have to go through it all, trust me.

MORFELD [01:45:08] He was ready, not nervous about that one.

PAUL REA [01:45:11] Well, I would anyway.

WAYNE [01:45:13] I'm a tort attorney, too, so.

PAUL REA [01:45:14] OK. Well, just in general, broad terms, it's just-- filing a bankruptcy is to react to a mountain of debt that you have no hope of being able to make payments on. Federal bankruptcy law is out there to allow you a fresh, clean break from all of these debts, the downside being that it's the worst mark on your credit report. But the good side is that it's going to take care of all of this stuff that's just weighing you down.

Nebraska, the good life, it's not very good if you're having to worry about living paycheck to paycheck. So, I mean, my clients come in; they've been robbing Peter to pay Paul, which I've always encouraged because, well, I'm Paul. In the end, bankruptcy is there to wipe out these debts. And so when you file the bankruptcy, you get what's called the automatic stay. It's part of federal law 11 U.S.C., Section 362, which is kind of unique. It's an order from the code itself. There's no judge involved. It tells all these civil litigants, you have to stop what you're doing, no letters, no phone calls, no lawsuits, no garnishments, no collection activity whatsoever; oh, boy, do we mean this. It is so strong a section of the law that we usually don't have any problem with it because as soon as we say bankruptcy has been filed, the plaintiff's side goes, hey, sorry, didn't mean to bother you. In the end, what happened in Bayliss was that the court said, OK, if you file the suggestion of bankruptcy, you've entered your appearance because you've asked the court for some action, which makes no sense to us as the bankruptcy bar. We're saying, well, what did we ask for? All we did was give you the message a bankruptcy has been filed; you need to sit back. Well, that's a general appearance, apparently, and now we've got you in this court and we're giving up any rights of defense regarding the proper service or process, regarding the personal jurisdiction over the defendant. And those are things-- they're real super-technical parts of the law, I get that, but it's something that we encourage the senators to pass? Any other questions?

MORFELD [01:47:16] Any other questions? OK. A bankruptcy attorney with a sense of humor and some good jokes. Thank you. [LAUGHTER] Next proponent. Professor Lenich.

JOHN LENICH [01:47:31] OK. My name is John Lenich, J-o-h-n L-e-n-i-c-h. I teach civil procedure at the UNL College of Law, although I'm here today as a citizen rather than as a representative of the university. Now the LB308, which I support, makes minor changes in the law, but minor changes that have a big effect because they deal with the problems raised by the court's decision in Bayliss. And-- and you might be wondering, if this decision has so many consequences, how come the Court of Appeals decided the case the way it did? And we can't be sure of that. But Bayliss is one of those cases that I think illustrates the adage of "hard cases make bad law," because what happened is the defendant in that case was sued in his capacity as the personal representative of an estate and he got a summons saying, you're sued in that capacity; and he's also sued in his-- as an individual, but he didn't get a summons directed simply to him as an individual. So he's in the case, he's defending the case, protecting the interest, and then he loses. He goes up on appeal and says, I think I've got an ace in my back pocket, I was never properly served as an individual, therefore, I-- because I'm an indispensable party in that capacity, the entire case has to be-- the decision must be vacated and I get a second bite at the apple. And the Court of Appeals, I think, looked at that and said, we're not going to let that happen, and stretched the law, I think, a little bit about what constitutes an appearance. And so we're really not slapping the face of the court here. I think we're just correcting a-- it was the right result, I think, but the reasoning is creating

some problems. And what LB308 does is it adds a new section to 25-156-- or 516.01-- that's the statute the court relied on in Bayliss-- to make it clear, a new subsection (3), that the filing of a suggestion of bankruptcy is not an appearance and does not waive any objections to personal jurisdiction or service. It also cleans up some of the archaic language that I've used to torture my students with over the years. But I think removing that archaic language, 19th century terms, is a good thing. And as Senator Lathrop mentioned, it also addresses some of the issues in Section 25-217, the one that specifies six months for service. It changed-- the LB308 changes months to days, which is the standard in most of our procedural statutes and rules. It includes some language about the dismissal is with operation of law and other things that you'd find out about if you read the cases. But it's pretty critical stuff, so it puts it right in the statute. And it also deals with that problem of you filed your suit, the stay in bankruptcy comes, or there's a court injunction on your case and the six-month period runs. That's not much of an issue if the statute of limitations hasn't run; you lose your filing fee. But if the statute has run, then you're out of luck. If there are any-- unless there are any questions.

MORFELD [01:50:53] Thank you, Professor Lenich.

JOHN LENICH [01:50:55] Thank you.

MORFELD [01:50:55] Any questions? OK. No bankruptcy jokes, but--

JOHN LENICH [01:50:59] OK. [LAUGH]

MORFELD [01:51:00] --we appreciate your testimony regardless. Any other proponent testimony? Any opponent testimony? Anyone testifying in the neutral capacity? Senator Lathrop.

LATHROP [01:51:16] I'll just make this observation that I told Senator Brandt before today that this was going to be really interesting, that we were going to take up "civ pro" and he would find this a lot more interesting than yesterday. No, I think it's pretty clear. This is-- this is pretty straightforward. I think it's consent calendar stuff and I look forward to the support of the committee.

MORFELD [01:51:38] OK. Thank you, Senator Lathrop. And there are no letters in opposition, support, or neutral capacity, for the record. Senator Lathrop, are you taking up your next bill or--

LATHROP [01:51:49] We could-- yeah, I can do that as long as I'm sitting here, and we'll do Senator Wayne's next.

MORFELD [01:51:53] Senator Lathrop opening on LB685.

LATHROP [01:51:54] Good afternoon, fellow members of the Judiciary Committee. My name is Steve Lathrop. You might have noticed that three of my bills are set for like the last week or the third-from-the-last day. It's L-a-t-h-r-o-p. I'm the state senator from District 12 and I'm here today to introduce LB685. This bill was brought to me by the Nebraska State Education Association, along with AM912, which is being shared with the committee. The bill addresses issues raised in two recent Nebraska Supreme Court decisions related to public employees' access to state courts when it comes to employment disputes. We believe one-- one result of these Supreme Court decisions has been to place undue limits on the public employees' ability to bring a declaratory judgment action. As amended by AM912, LB685 makes two changes. First, it ensures that people who are involved in an informal-- pardon me, in a formal grievance procedure don't forfeit their ability to seek judicial relief. Further, it clarifies that the state and its political subdivisions waive sovereign immunity in employment cases brought by public employees. The amendment also cleans up language in the original bill that some people felt was overly broad. That criticism was probably well placed. There are some speaking after me who can go into more detail about the two decisions that prompted the changes in this bill, and that's why it is important for us to guarantee access to courts in such cases. However, I'm also happy to try to answer any questions that you might have. I would appreciate your support of LB685.

MORFELD [01:53:47] Thank you, Senator Lathrop. Any questions for Senator Lathrop? OK. Seeing none, proponent testimony.

NICK WELDING [01:54:02] Thank you, Senator Morfeld and members of the Judiciary Committee. My name is Nick Welding, N-i-c-k W-e-l-d-i-n-g, and I'm here testifying in support of LB685 on behalf of the Nebraska State Education Association. Plain and simple, LB685 enforces and protects the constitutional right to access the courts of this state. Article I, Section 13, of the Nebraska Constitution states in its entirety, "All courts shall be open, and every person, for any injury done him or her in his or her lands, goods, person, or reputation, shall have a remedy by due course of law and justice administered without denial or delay, except that the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract." The exception in Article I, Section 13, makes clear that a person's right to justice may not be denied or delayed unless the Legislature provides otherwise. Now LB685 is necessitated by recent decisions of the Nebraska Supreme Court. The first decision is *Armstrong v. Clarkson College*, which was a decision issued by the court in the fall of 2017. In *Armstrong*, the court held that the exhaustion of a mandatory grievance procedure in a contract is a condition precedent to enforcing the rights under that contract. In doing so, the court reversed a \$1 million jury verdict in favor of a nursing student because she did not exhaust the grievance procedure which existed in a student handbook prior to filing her breach-of-contract claim. In its Opinion, the court made no reference to Article I,

Section 13, or the fact the Legislature has never provided for the enforcement of grievance procedures. The impact of the Armstrong decision was immediate and drastic, and I think I might have been one of the first practicing attorneys that felt its impact. Before the Armstrong decision was issued, my office represented an associate athletic director from Chadron State College in an action for declaratory judgment against the board of trustees. In this case we sought a declare-- we sought a declaration from the district court regarding her rights, her employment rights under her employment contract, and the collective bargaining agreement as a result the college's failure to provide her adequate notice and due process. Just days before the case was submitted to the district court, the Armstrong decision was issued and the court dismissed our complaint on summary judgment because my client did not exhaust the grievance procedure. We appealed that decision to the Supreme Court and-- and focused exclusively on the constitutional implications, and this decision was issued last Friday. Unfortunately, the court did not address the constitutional implications but, rather, dismissed the appeal and raised, sua sponte, issues with sovereign immunity, and effectively held that the complaint was not proper because it did not identify any damages, even though the declaratory judgment was filed before any damages had incurred. So with the Armstrong decision and with the Burke decision, which is my case issued last week, the reality is that grievance procedures can now deny plaintiffs a remedy by due course of law absent any legislative enforcement. As it relates to public school teachers in this state, they must now go through a grievance process no matter how immediate the need is for judicial remedy. And make no mistake, school districts are aware of the Armstrong decision and have immediately advised school boards to resist any efforts by local associations to negotiate the implications of Armstrong. On top of this now, teachers are now unable to bring declaratory judgment actions prior to incurring damages as a result of the Burke decision. The need for LB685 is immediate and unless until Nebraska law is change, employees such as teachers will be deprived fundamental rights. I do just want to make real clear real quickly is that LB685 will have no impact on laws related to binding arbitration or mediation. It is simply to address the Armstrong and Burke decisions.

MORFELD [01:58:05] Thank you, Mr. Welding. Any questions? OK. Seeing none, thank you. Any other proponent testimony? Welcome.

MADDIE FENNELL [01:58:22] Good afternoon, Senators. Hi. One of the people on my staff are going to be bringing you copies of my testimony that I just put together in the last five minutes. So thank you all, members of the Judiciary Committee. My name is Maddie Fennell, M-a-d-d-i-e F-e-n-n-e-l-l. I'm the executive director of the Nebraska State Education Association and I'm here representing our 28,000 NSEA members in support of LB685. We offer this letter of support in-- as a-- LB685 as amended. This bill attempts to remedy a decision by the Nebraska Supreme Court that overturns decades of case law and renders moot the statutory rights of educators across the state. Let me provide a timely and specific example that literally just landed in our office. Due process rights of

educators state that if you receive notice that your contract is going to be terminated, you have seven days from notification to request a hearing. Just this week, we had a teacher, who was also in a school that was experiencing the flood, was notified. Per statute, even overcoming the trials of the flood, she submitted her request for a hearing within the seven days. She sent the request by certified mail and provided documentation. Our legal counsel was notified today that the school district, citing last Friday's Supreme Court decision, is not going to allow this teacher her hearing. A due process right without a remedy is meaningless and illusory. There is not a true right to due process if you cannot exercise that right and if a court of law won't enforce it. This teacher's timely request is being arbitrarily denied this teacher will never get a hearing. Maybe there is poor teaching practice in this case. Perhaps ending her contract is justified. Or maybe, as we've found in other hearings, this is an arbitrary and capricious decision that wasn't based on classroom practice, and it very likely will harm her career without even the opportunity to provide her side of the story. Teachers across this country, West Virginia, Oklahoma, Arizona, and more, did not start the Red For Ed movement solely because of lack of adequate school funding, large salaries or-- large class sizes or salary deficiencies. These educators became fed up with the treatment they were receiving. We are here to ask you to add the statutory language needed to ensure our Nebraska teachers are treated fairly. Please do not allow our teachers' rights to be stolen by judicial fiat. We asked the committee to advance LB685 to General File before more teachers are harmed. Thank you.

MORFELD [02:00:53] Thank you, Ms. Fennell. Any questions? Senator Slama.

SLAMA [02:00:57] Thank you for coming in today and testifying on this bill. Could you just clear up for me, what are some applications of this bill outside of educators and their contracts?

MADDIE FENNEL [02:01:11] So as I understand it-- and I am not a lawyer. I'm married to one. There's a lot more in here besides me. But as I understand, it was very carefully written so that it would not apply to other situations that could be harmful to the state, so, for instance, that it would not allow prisoners to arbitrarily sue the state. We tried to write this so that what we're asking is that those things which the state already says in statute that cannot be waived, that we continue that. But as I understand it, because of the current judicial statements that they made last week, if we don't make it completely specific, even though current law says the state can be sued, if we don't say the state can be sued in this instance, it's not good enough. So that's my understanding is that we're trying to make it very clear that it's in regards to schools and schooling.

SLAMA [02:02:07] OK. Thank you.

MORFELD [02:02:08] Any other questions? OK. Seeing none, thank you for your testimony.

MADDIE FENNELL [02:02:15] Thank you.

MORFELD [02:02:15] Other proponent testimony? Anyone here to testify in opposition? If you're here to testify in opposition or neutral, if you could come to the front in the on-deck chairs, we'd appreciate that. Welcome.

JAMES GESSFORD [02:02:39] Thank you, committee members. My name is James Gessford, J-a-m-e-s G-e-s-s-f-o-r-d. I'm appearing here today as an attorney. I practiced 44 years. I represent many political subdivisions and many individuals. One of the main concerns that exists with this bill really is I believe it's overbroad. I believe that it does relate to areas that are beyond the area of education. And I've negotiated contracts for 44 years and I got to tell you, we've got all kinds of contracts out there where the parties over the years, the times have really changed. Back when I began practicing law, everybody just wanted to litigate. And then as the times went on, the whole notion of alternative dispute resolution became more popular. And obviously, this body has spent a considerable amount of time in terms of looking at those forms. You've made legislative findings that, you know, alternative dispute is cheaper, it takes less time, and those types of things. Now specifically in the education area, the point I think that's important is whether or not a school district has a grievance procedure is ultimately a determination by the Commission of Industrial Relations. The CIR has held on numerous occasions that a grievance procedure is a mandatory subject of negotiations. And it seems to me that this bill totally, totally cuts against those notions. And I can tell you, over the years, districts have given up something in the negotiation process to have a grievance procedure, on the one hand, where, on the other hand, the-- the teachers' union got what it wanted because the district gave up something. And essentially what this bill is saying is, well, we don't care about what's happened in the past, we're just going to let you automatically bypass, if you will, the-- the grievance procedure that has been collectively bargained. If you're in the education field-- I do a lot of work not just in the education field, with all kinds of business, and if you're in the other business areas, to me, there's some issues here, there's some constitutional issues on impairment of existing contract rights. If-- if under Article I, Section 16, of the Nebraska Constitution, if there is a collective bargaining agreement in place that includes a grievance process and a grievance procedure, then that has to be followed. That's a contract, and legislation that impairs that contract wouldn't-- would not be-- would not be valid. The other interesting point that I'd make is that-- I'm sorry.

MORFELD [02:06:02] Yeah, if you just want to finish that one thought.

JAMES GESSFORD [02:06:03] Yeah, one thought. It's interesting that Monday on LB537, grievance was the thing. Today, no, now grievance isn't the thing. I'd be happy to answer any questions.

MORFELD [02:06:18] Thank you, Mr. Gessford. Any questions?

JAMES GESSFORD [02:06:22] Thank you.

MORFELD [02:06:22] OK. Seeing none, thank you very much. Next opponent testimony.

VANESSA SILKE [02:06:31] Good afternoon, members of the committee. My name is Vanessa Silke, that spelled V-a-n-e-s-s-a S-i-l-k-e. I'm an attorney with Baird Holm and we represent the Nebraska State College System. My colleagues at Baird Holm represented the State College System in the case that came down last Friday that Mr. Welding referred to. It's Burke v. Board of Trustees. The cite for that is 302 Neb. 494. I want to defer to the experts in my firm if the committee has any additional substantive questions, but I want to make sure that we make the record today that the College System opposes the bill as written and as amended. First of all, we've got to make a record of the policy issues that are at play here in the way the bill was drafted and in the way that it was amended. The Nebraska Supreme Court has never waived, and nor has the Legislature ever waived, the state's sovereign immunity for purposes of the Declaratory Judgments Act. That would be a huge change in statute for this committee to make or for this Legislature to consider. And whether the-- the amendments tailor that waiver or keep it as broad as it is, just waiving that by itself would be a huge step in a different direction. Secondly, those amendments-- they don't really fix-- they're fixing a problem that doesn't really exist. Unions and employers have utilized the grievance procedures that were at play in the underlying facts of this case for over 75 years. State employees, including the teachers' union employees, regularly utilize those grievance procedures. And in fact, there are cases pending before the Nebraska Supreme Court that prove that the court system is open for union employees that work for the state. It's open for those who utilize the procedures that are in place. I'm not going to repeat the prior testifier, but I do agree with all of his comments that the employees that participate in those bargaining agreements under statute have a number of benefits that are afforded to them that are the result-- that result in those agreements. So when they engage in that process and they agree to a grievance procedure, we simply want them to continue to utilize that procedure before they resort to the courts. So with that, I'm nearly done with my time. I'm happy to answer any questions you may have.

MORFELD [02:08:52] Thank you, Ms. Silke. Any questions? Senator Pansing Brooks.

PANSING BROOKS [02:08:56] Thank you for coming, Ms. Silke. So I presume you heard Ms. Fennell talk about the case where the women tried to meet the standard within seven days or file. What-- what is the --what is your response to that? What-- what are her options?

VANESSA SILKE [02:09:12] You know, I don't know the specific facts of her bargaining agreement or the notices that she received or any of those underlying facts. I think that if

something just happened seven days ago, it's certainly a reason to look into it. From a legislator's point of view, I don't think it's a reason to change the statute. I don't think that that's representative of how we've engaged with employees that are members of bargaining units, and certainly that would be an important thing to consider. Again, we have a number of cases that are pending specifically for employees in that situation that chose to appeal and utilize the grievance process before they resort to the courts.

PANSING BROOKS [02:09:48] OK. Thank you.

MORFELD [02:09:48] Any other questions? Seeing none, thank you, Ms. Silke.

VANESSA SILKE [02:09:55] Thanks everyone.

MORFELD [02:09:58] Next opponent testimony. Welcome.

EMILY BOTTORF [02:10:12] Thank you. Good afternoon, Chairperson Lathrop and members of the Judiciary Committee. I'm Emily Bottorf, E-m-i-l-y B-o-t-t-o-r-f. I'm an attorney at Baylor Evnen law firm, and I'm here on behalf of the Nebraska Chamber of Commerce. We're in opposition to LB685 as written and as amended. I'm not a paid lobbyist. I just wanted to touch to Senator Slama's question. I do think that the issue here, and what the chamber feels the issue is, is that it's still too broad. This does not deal simply with the teaching issues that were identified by the proponents of this bill. As written, it includes all sorts of grievance procedures, and I think it's broad enough to still encompass private agreements between individuals, corporate contracts, vendor contracts, franchisor-franchisee contracts, employee handbooks, collective bargaining agreements. And I think, you know, the court has-- has always upheld the notion of requiring parties to a contract, or employees, exhaust an administrative procedure or, you know, exhaust some administrative remedies before running to court. And that's not something new; that's not a new notion. And I think courts would be overrun if suddenly people were-- were able to just file lawsuits that people had bargained for or originally contracted or agreed to handle first in an administrative procedure or some sort of grievance procedure. So I do think, I don't want to echo what others have said, but I think it does run afoul to our very strong laws favoring freedom of contract. And I still think I would just like to add that the chamber thinks this is still just a little bit too broad, even as amended, and is opposed to it. Any questions?

MORFELD [02:11:57] Thank you, Ms. Bottorf. Any questions?

EMILY BOTTORF [02:11:58] Thank you.

MORFELD [02:12:00] Thank you. Any other opposition testimony? Any neutral testimony? Welcome.

ROBERT J. HALLSTROM [02:12:24] Vice Chairman Morfeld, members of the committee, my name is the Robert J. Hallstrom, H-a-l-l-s-t-r-o-m. I appear before you today as registered lobbyist for the Nebraska Bankers Association in a neutral capacity on LB685. Our organization was opposed to the green copy as introduced. However, we visited with both Mr. Welding and Senator Lathrop and appreciated their willing-- willingness to narrow the scope of the legislation. We were concerned about its application to binding arbitration and mediation and with the amendment that's been proposed, if that were to be adopted by the committee, any opposition that we had to the original bill would be removed. Be happy to address any questions.

MORFELD [02:13:06] Thank you. Any questions? OK.

ROBERT J. HALLSTROM [02:13:10] Thank you.

MORFELD [02:13:10] Seeing none, thank you. Neutral testimony?

WES BOTTORF [02:13:21] Good afternoon Judiciary Committee. My name is Wes Bottorf, W-e-s B-o-t-t-o-r-f. Might sound a little familiar from a couple testifiers ago. I am the registered lobbyist for Farmers Mutual of Nebraska. I wrote a letter in opposition to this bill previously that I'd entered before I had notice of the amendment being filed. I did not anticipate planning-- or I-- excuse me. I did not plan on testifying today on behalf of this. But after talking with Senator Lathrop and with his staff, I just wanted to go on the record and say thank you for working with us on this and that with the amendment, if it were to pass with this, we would not be opposed to the bill with the amendment. So thank you again, Senator Lathrop and staff, and thank you for your time. If there's any questions, I'd be happy to answer them.

MORFELD [02:14:08] Thank you, Mr. Bottorf. Any questions? Seeing none--

WES BOTTORF [02:14:12] Thank you.

MORFELD [02:14:13] --thank you. Any other neutral testimony? OK. Seeing none, Senator Lathrop to close.

LATHROP [02:14:19] Very briefly. So it's-- what the Supreme Court said in the more recent case was that the state had not waived its sovereign immunity with respect to a declaratory judgment action. So if you want to try to sort something out before there are damages and who's got responsibility or an interpretation of a contract, you file a declaratory judgment action, you ask the court to sort it out. What the Supreme Court said is the state hasn't waived its sovereign immunity with respect to bringing an action under the Declaratory Judgments Act. That's what this bill does in part. The concerns that have been expressed, I'm happy to work with these folks and try to resolve that before we advance the bill to the floor for full consideration, hopefully.

MORFELD [02:15:05] OK.

LATHROP [02:15:05] With that, I have no further comments.

MORFELD [02:15:09] Any questions for Senator Lathrop? OK. Seeing none, I also want to read some letters of opposition into the record: Wesley Bottorf with Farmers Mutual of Nebraska, and which I think he's now apparently in neutral capacity; Dennis Joslin, Council of Independent Nebraska Colleges; Rob Winter, Greater Nebraska Schools Association; Mike Dulaney, Nebraska Council School Administrators; and Patti Gubbles, the Norfolk Public Schools Board, all in opposition. With that, I'll hand it back over to Chairman Lathrop.

LATHROP [02:15:40] OK. Thank you. That will bring us to Senator Wayne's LB491, Senator Wayne to open.

WAYNE [02:15:59] Good afternoon, Chairman Lathrop and the Judiciary Committee. My name is Justin Wayne, J-u-s-t-i-n W-a-y-n-e. And, Senator Brandt, you are the reason I brought this bill. I know you are looking for property tax relief and I wanted to make sure in Judiciary you got a chance to vote on that. This bill is a clarification bill. And I have to be careful how to say it because we are, if this were to pass, overruling some cases regarding the Supreme Court, but I think it's because the Supreme Court got it wrong. And I don't say that lightly. I say that very heavily because the Supreme Court does a really good job but every once in awhile, I think they might be able to get it wrong. And in this case what I handed out was a brief memo and most of the sentences, and I say most, came from Vince Powers. I'm not going to steal his work. But they were rearranged and-- and modified. But Article V of our-- Article VII, Section 5 of our constitution allows for punitive damages. Nowhere does our constitution say punitive damages are banned. What they do-- what the constitution does say is that any license, fines or, in this case, punitive damages must go to the common school district fund. That's where the property tax relief comes in. In Omaha, we get a little bit of fines from licensees, parking tickets, things like that. It does go into the equation of TEEOSA. But if you think of all the unequalized school districts across the state who could benefit from punitive damages, that extra money going into their coffers to hopefully lower property taxes, and we can tighten the bill, Senator Brandt, to make sure that happens, but on the issue of punitive damages, this was first taken up back in 1878, Boyer v. Barr. And what had happened at that time as the courts generally across the country were trying to figure out what punitive damages were. Were they double jeopardy? Were they too hard? How does it match? And so there was just unsureness across the country. And if you were to go back and look at that case, they were citing Indiana, Illinois, and different-- different states across the country but never said that it was unconstitutional, just wasn't sure how to apply it. Almost a century later, they came back and said in Alva [SIC] v. Conover that they were just-- it's well settled that-- that punitive damages are unconstitutional, and

there's no real analysis of where that came from. But when they went into the detail, and if you read the dicta in the holdings, it talks about private people receiving punitive damages. And that's clear. Our constitution does not allow private individuals to seek punitive damages. But it is clear from that, and clear from those rulings that all try to get private individuals punitive damages, that can't happen. But the fact of the matter is it's constitutional and this language just clarifies to the Supreme Court that, no, it is constitutional. That's what this bill does. It is constitutional, but it has to be distributed to the common schools fund. That's all this bill does. And the last page of the-- or the last paragraph that I handed out in this little, short memo, the Legislature has already done-- this is not new-- in the Workers' Compensation Act. It is a punitive damage. If something doesn't go right, they are-- they are charged 50-- 50 cents higher, 50 percent higher, and it goes to the common public school fund. So it's already done. We just have to make sure it's clear throughout the rest of any other action that it does apply. Now real quick, if anybody wants to know, punitive damages isn't just a run-of-the-mill-- a jury comes back and awards punitive damages. It is a way to hold, particularly businesses most of the time, or individuals, in the case of a severe drunk driver who's been drunk driving five or six times and got caught multiple times, to ensure that. this egregious act doesn't happen again. It's a deterrent. It's a way to say, above and beyond, we're going to fine you more, which is why it falls underneath the fines, to make sure you don't continue to do this action. This is really an accountability bill to make sure in the court systems we can hold our most egregious bad actors accountable on the civil side, and in doing so, I believe we can provide property tax relief. And I'll answer any questions.

LATHROP [02:20:36] Senator DeBoer.

DeBOER [02:20:39] First I'll preface this by saying I thought that this was already the law in Nebraska, so apparently I'm remembering it from a different jurisdiction. And second I'll say it must have been in a jurisdiction where I may have once practiced because I remember saying to someone, well, let's bring a case for punitives to go to the public schools and they said we don't want to do that because every-- it'll never go to the public schools because people will just settle; instead of getting punitives, they'll settle, so this will never actually be property tax relief. What do you think of that argument, Senator Wayne?

WAYNE [02:21:11] Well, I do think there might be some pressure on settling. But in these major cases that you see across the country-- and again, we're only like four states that don't have it, and one is not a state. It's Puerto Rico, Washington, Louisiana, and ourselves. Where there are cases that are huge-- I want to say-- I want to say malpractice, but huge, egregious behaviors, they go to-- they go-- they go all the way through. We're talking about maybe the littler cases that maybe won't. But again, that's making sure that there's just compensation for the individual who was hurt by whatever product, whatever egregious action. And maybe it didn't go to suit, but that still is a just remedy underneath my belief.

DeBOER [02:21:54] Then additionally, how do you get lawyers to bring these cases, right? So arguably these would be under a-- I mean, how does that work? Does the fee structure-- because the lawyer wouldn't get a percentage of the punitives, or would they?

WAYNE [02:22:10] I didn't include that or "disclude" that. I think that's-- I'm open to an amendment to clarify whether that happens or happens. My whole point of bringing this bill was just to clarify that punitive damages can exist and should exist in Nebraska and it goes to the common fund. If we want to tighten the language of what lawyers can and can't get, that's fine. If we want to tighten the language of how to make it for sure go to property tax relief in a way that meets yours or Senator Brandt's definition, I'm OK. with that.

DeBOER [02:22:39] OK, thanks.

LATHROP [02:22:43] Senator DeBoer? Senator Brandt.

BRANDT [02:22:43] Thank you, Senator Wayne, for appearing today. Seeing as how I've got drug into this, what-- what would be your estimate of annual punitive damages in the state of Nebraska for property tax relief?

WAYNE [02:22:56] Well, that's just it. Nobody files it because we haven't been able to since 1887, so we don't know. But if you look at Texas, they often have verdicts that are hundreds of millions, and that would go to those local school districts in this case. And again, we're talking the egregious, horrific behaviors. And my whole point into this is right now we're not getting any relief because we're not-- we can't file it. There's a belief that we can't file it. So by allowing us to file it, if it were to happen, there would be some relief.

BRANDT [02:23:30] So I'm warming up to this concept but-- [LAUGH] but aren't those high punitive damages primarily because of southern juries/

LATHROP [02:23:43] Hmm. No-- maybe. I mean Nebraska historically, in my jury trials, and if you talk to most tort-- tort attorneys or plaintiff attorneys will say we have one of the more conservative jurisdiction. But again, if it's \$10,000 in Crete, Fairbury, that's going to help out their school district. So I'm trying to make sure we don't close off the idea and actually we open the door back up.

BRANDT [02:24:11] All right. Thank you.

LATHROP [02:24:14] Senator Pansing Brooks.

PANSING BROOKS [02:24:15] Thank you for coming and bringing this, Senator Wayne. I-- unfortunately you missed my previous bill because I discussed punitive damages and the fact that I think that we need to get rid of whatever this rule is that acts as a barrier to people getting punitive damages. Now that being said, my concern was with human trafficking and the fact that there are victims who are-- that are-- that suffer irreparable harm in a way from being raped multiple times a day and who are under coercion and force and threat to their lives often. So I agree we need to work on property taxes. But also, I mean, I'm trying to look at it from the point that, yeah, there are heinous acts by some defendants that we need to stop. And I had also looked at RICO actions. I'm just trying to talk to you about there-- there are still some crimes out there where there are victims that need to be at least made a little bit more whole. So I-- I mean, I don't want a windfall to anybody and we can then give, you know, the money to the property taxes. But there are people that are significantly hurt and they are barred from any kind of recovery because of the fact that we do not have any kind of punitive damages.

WAYNE [02:25:48] And I agree on the individual where in the case of horrific, egregious actions and punitive damages are civilly assigned in civil cases. However, I have two constitutional amendments this year. I wasn't trying to do three, so I was trying to operate within our current constitution. But I'm more than happy to next year have a conversation around changing that language. But the issue is, when we talked about doing a constitutional amendment, schools and everybody else, some of these smaller jurisdictions who get speeding tickets and those kind of things, rely on these fines. And so it becomes, how do you craft the ballot language on a constitutional amendment to allow for that but still make sure the rest of the fine? I mean, I just I wasn't smart enough to come up with that. So I worked with some people to come up with this idea.

PANSING BROOKS [02:26:39] Well, I appreciate it and I thank you for bringing it up because I definitely think it needs to be discussed.

WAYNE [02:26:43] Thank you.

PANSING BROOKS [02:26:44] Thank you.

LATHROP [02:26:46] I do not see any more questions for you, but thanks for introducing the bill.

WAYNE [02:26:50] OK.

LATHROP [02:26:50] And we'll take proponent testimony first.

JOHN LINDSAY [02:27:07] Thank you, Senator Lathrop. Members of the Judiciary Committee, my name is John Lindsay, J-o-h-n L-i-n-d-s-a-y, appearing as a registered lobbyist on behalf of Nebraska Association of Trial Attorneys. When Senator Wayne first

told me he was going to introduce a bill on punitive damages, it brought me back to my days clerking for the Supreme Court a lot of years ago and reading a case called *Abel v. Conover*. And it struck me when I was reading that case that it did not stand for the proposition that we don't have punitive damages in Nebraska. The fact is, we do; we just haven't had a case go to the Supreme Court that was set in the right manner. The cases all stem back to a case back in 1877, *Atchison v. Nebraska-- Nebraska Railroad Company v. Baty*. That case, it struck down a statute because it allowed the owner of animals killed on a railroad to recover double the value. And the Supreme Court's decision in that was that the constitution prohibits punitive fines and penalties to be paid to individuals. It requires that they go to the public school fund. Over the years, they lost the rationale from those early decisions of the 1870s and 1880s. And by 1960, when *Abel v. Conover* was decided, they-- they just said there's-- they were saying there was no punitives without going back to the rationale. The constitution is clear that it does not say that there are no punitives. It says they cannot be-- that all fines and penalties must be paid to the public school fund. And the reason for that, I believe, goes to the-- the whole nature of punitive damages. Punitive damages are intended to deter conduct or to punish a defendant. Why? And it's before-- it's a damage done to society, not just to the individual. The individual will get compensatory damages and should get fully compensated for their damages. But if the depend-- the defendant's conduct is so egregious that it is an affront to society, it's society that should benefit from any penalties paid. The founders of our state determined that the way to-- to benefit society was through our public schools. And so it determined and inserted in the constitution a provision that all fines, penalties, and licensing money be paid into the public school fund. We are-- we support the statutory recognition that punitive damages are already allowed in the state of Nebraska and we appreciate Senator Wayne bringing a bill that establishes a procedure so that all-- all folks will be following the same procedure in bringing this type of an issue before the court. I'd be happy to answer any questions.

LATHROP [02:30:34] Senator DeBoer.

DeBOER [02:30:36] I'll ask my same two questions. One, how do we actually work this out so that folks don't just immediately settle if there's the threat of punitives which then-- you know, I mean, assuming that there is at least a colorable argument. I think you would immediately settle, and then that doesn't go to the public schools, and arguably you'd settle for a higher amount than compensatory damages.

JOHN LINDSAY [02:31:02] I would argue Section 4, sub (2) in the bill allows the county attorney-- on an award of punitive damages, the county attorney can be made-- can make himself or herself a party to the action for the purpose of defending the award of-- defending the interest of the public schools. So I-- I-- if that needs to be tightened up--

DeBOER [02:31:26] Would that work, though, right? So Brandt sues me. I've done something terrible. Now he's threatening me with punitive damages. How do you-- I'm

just going to settle with him so I don't-- I-- I did the thing so I have to settle with him so that I don't have to pay the punitive damages, because he agrees if we don't go to court you'd give me what-- \$100,000 more than I would have gotten otherwise. So now he gets this windfall of an extra \$100,000 and the schools get nothing. How do you-- how do you get into the middle of that settlement?

JOHN LINDSAY [02:32:03] Settlement discussions occur at any time. Valuing cases is-- is more of an art than a science. And determining what-- how-- how-- to what extent a plaintiff has been injured is-- is something that gets negotiated out. And certainly both sides would use whatever tools were-- were in their toolbox in negotiating those types of settlements. It would have to be a pretty healthy fear of punitives to settle on the compensatory side. But I think I heard Senator Wayne say in his-- in his opening that he'd be willing to tighten that up. And if there is a better way to protect the interest of the common schools, then we'd be happy to help try to work out language on that as well.

DeBOER [02:32:56] OK. And then my second question is, how do the lawyers fit in on this?

JOHN LINDSAY [02:33:00] I'm-- I'm sorry.

DeBOER [02:33:00] So how do the lawyers fit in-- fit in on this? Do they get paid a-- so if you have a contingency fee, do you get a contingency of the amount that goes to the public schools in punitives?

JOHN LINDSAY [02:33:10] You get-- it would depend on the agreement and things are contracted. But I think a standard contract would say that you get a-- in a contingent fee agreement you get a percentage, a negotiated percentage of what any recovery would be. I'm not sure how that would be handled on the-- on the punitive side. It's not damages that would be going to the individual, so there wouldn't be a recovery there. But perhaps there should be something-- something mentioned in the bill to-- which would also serve to encourage. Addressing your first issue, if there was an ability to-- to recover a fee in pursuing punitive damages, then perhaps that would encourage-- encourage plaintiffs to stay in the game longer. Or perhaps the county attorney should have some-- some ability to intervene. I-- I-- they're legitimate questions but I think there are things that can be worked out.

DeBOER [02:34:20] I mean it's-- yeah, I mean, maybe you can, but it-- it isn't clear yet.

JOHN LINDSAY [02:34:24] I would-- I would agree that that's-- you've raised an issue that might be a way around the provision that's in here and so perhaps it could use some-- some tightening up.

DeBOER [02:34:36] OK. Thank you.

LATHROP [02:34:43] Senator Pansing Brooks.

PANSING BROOKS [02:34:43] Thank you. Thanks for coming, Mr. Lindsay. I guess what my question is-- you also are often a lobbyist for some of the schools, is that correct?

JOHN LINDSAY [02:34:52] For a particular school district, yes.

PANSING BROOKS [02:34:55] Yes, for a specific--

JOHN LINDSAY [02:34:56] I'm not appearing on their behalf today now.

PANSING BROOKS [02:34:57] I know you're not but-- but are you-- because you do have a particular knowledge about schools, has there been any kind of-- of-- I mean, have we gotten any kind of payment through the schools at all through this kind of-- because part of this is still available, right?

JOHN LINDSAY [02:35:16] I think the schools mostly get money from me because of my speeding tickets.

PANSING BROOKS [02:35:21] [LAUGH] Well, that's true.

JOHN LINDSAY [02:35:22] But as far as-- as far as the punitive, we wouldn't have a punitive damage-type thing. Right now I think probably the best example of-- of-- of punitives that benefit Nebraska would be the Master Settlement Agreement of tobacco cases where the state gets, I don't know, \$X million, \$20-some million a year-- \$40 million, I guess, a year.

PANSING BROOKS [02:35:45] So that goes to the schools.

JOHN LINDSAY [02:35:47] No, that-- that's a-- that was litigation that was in federal court--

PANSING BROOKS [02:35:51] Oh, OK.

JOHN LINDSAY [02:35:51] --over-- that was settled through that Master Settlement Agreement. But I think it was prompted by a case in Minnesota in which, and this goes back to the '90s, but I think in which punitives were a-- were a threat. So while it wasn't a court decision, it was a settlement that directed dollars coming back to the state of Nebraska. And you're correct. They do not go to the schools. They go to a variety-- well, the Legislature decides where those go.

PANSING BROOKS [02:36:18] OK. Well, if Senator Wayne has figured out a way to bring millions of dollars to the schools and thereby relieve property taxes, wow, he might be the hero of the century. Thank you very much.

JOHN LINDSAY [02:36:32] Yes.

LATHROP [02:36:33] Just as a point of clarification, these are very unusual cases--

JOHN LINDSAY [02:36:36] Yes, they are.

LATHROP [02:36:38] --wherever they happen at. Oftentimes it is somebody suing their own insurance company for behaving un-- very unreasonably in the handling, in fact, bad faith--

JOHN LINDSAY [02:36:48] Yes.

LATHROP [02:36:48] --in the handling of a first-party claim, make--

JOHN LINDSAY [02:36:51] You--

LATHROP [02:36:51] --a claim for hail damage on your roof and they won't pay out anything and you end up suing them and you find out that they knew all along that you actually had hail damage but they wanted to save some money.

JOHN LINDSAY [02:37:01] And it was a perhaps a pattern and practice to-- did I-- well, there was a book-- or a John Grisham book that was turned into a movie that talked about basically punitives and-- and based on a pattern and practice of egregious behavior. But that's-- you're exactly right. It's-- they're not common. These are not everyday cases. A defendant has to be-- it has to be something where a jury is going to look at a defendant and say, that is outrageous, and that just doesn't happen that often.

LATHROP [02:37:34] That said, whenever they do happen, if we were to recognize or if a court were to instruct a jury on punitive damages--

JOHN LINDSAY [02:37:43] Yes.

LATHROP [02:37:43] --the proceeds to the school district, and that's by constitution.

JOHN LINDSAY [02:37:47] Right. There are-- and it did come from Vince Powers. It was referenced by Senator Wayne. He has actually gotten a couple of punitive damage awards that were not appealed but there was-- on the jury verdict form, there was a line for punitive damages to be paid to the public schools fund.

LATHROP [02:38:08] OK. Senator Brandt.

BRANDT [02:38:12] So you're saying there's precedent for this?

JOHN LINDSAY [02:38:15] There is district court precedent. I don't believe-- well, the appellate courts, as I-- as I started-- talked about, the problem was that the punitive damages were being paid to individuals rather than to the public school fund. I don't know that the Supreme Court has entertained a case in which the punitive damages were paid to the public school fund. The cases where I'm referencing were jury verdicts out of-- out of district courts that because of the nature of the-- of the particular cases, they were never appealed. So the Supreme Court, as far as I know, has not had an opportunity to-- to rule on a-- on a case where they were properly being paid to the schools.

BRANDT [02:39:05] All right. Thank you.

LATHROP [02:39:08] I see no other questions. Thanks, Mr. Lindsay. Anyone else here as a proponent of LB491? Anyone here in opposition?

THOMAS A. GRENNAN [02:39:30] Good afternoon, Senator Lathrop and committee.

LATHROP [02:39:36] Mr. Grennan.

THOMAS A. GRENNAN [02:39:36] My name is Thomas, T-h-o-m-a-s, A. Grennan, G-r-e-n-n-a-n. I'm a native of Grand Island. I have been practicing as a trial attorney in Omaha for over 40 years. I'm with the Gross and Welch law firm. I have represented defendants insured by insurance companies. I've represented plaintiffs. I have represented defendants that weren't insured. I've represented companies on commercial matters. I have been on both sides of the litigation process. I'm a member of the Nebraska-- the NATA organization, Nebraska Association of Trial Attorneys, I'm a member of the Defense Counsel Association of Nebraska, and I am a fellow of the American College of Trial Lawyers. I'm not paid. I'm here as a citizen. I've never been down before a committee. I'm speaking in opposition to the bill. This bill is as broad a bill as I think you could possibly conjure up. It-- all you would have to plead as a plaintiff is that there were aggravating circumstances-- that's rather vague-- and that the defendant displayed actual intent to cause harm or cause injury through actions taken in reckless disregard for the lives and safety of others-- again, very broad, broad language. Our criminal code I think already has plenty of factors that will provide for deterrence to any egregious activities that would-- that this-- this organization-- this committee would like to avoid. It-- you should note there are no limitations on this, no limitations as to which defendants the-- the punitive damages could be assessed against. It could be assessed against individuals, corporations. It could be assessed against governmental entities. It could be assessed against employers. There is no limitation in this bill whatsoever. There is no monetary limitation. And as a trial lawyer and also as a lawyer who has handled

many, many appeals to the Nebraska Court of Appeals and the Nebraska Supreme Court, this creates a rather interesting situation where the Supreme Court or the Court of Appeals will have to take a look and just say, well, the jury I guess found that there are aggravating circumstances and the jury found that the defendant displayed actual intent to cause harm. And if that fits within that, a punitive damage award of however many thousands or millions of dollars could stand. I think there are inherent problems with this statute as worded and the Senator-- Senator Dworak [SIC] I think has--

DeBOER [02:42:30] DeBoer.

THOMAS A. GRENNAN [02:42:31] Sorry-- has identified some of them. As a plaintiff's attorney, which I have been, if you file this, you're-- on one hand, if you file it seeking recompense for negligence, that will allow a liability policy to come into effect and-- and thereby be-- create a pool for the plaintiff to collect from. But if you have a second claim or a second cause of action seeking punitive damages, you then have raised the intent to cause harm. Almost all liability policies have an exclusion for punitive damages and for intentional acts. That creates an inherent conflict for the attorney and for the client. It-- it would create a much larger mess than you could imagine. Take that forward a little bit. And since I started practicing, the landscape of litigation has changed dramatically. We used to try a lot of cases back in the day, but most of them get settled through the mediation process, which is a good, good process. But in this instance, you have a situation where the school district has a stake in the interest. And if-- now if the attorney is charging a contingency fee against both the punitive damage claim and the compensatory claim, I think that's an inherent conflict for the-- the attorney representing the plaintiff. It would most likely involve a situation where the school district could intervene and it also represents a situation where the county attorney gets drug into this per the statute.

LATHROP [02:44:13] Tom--

THOMAS A. GRENNAN [02:44:15] Yes.

LATHROP [02:44:16] --you've got to give me your last thoughts.

THOMAS A. GRENNAN [02:44:17] My last thoughts, I'll make it--

LATHROP [02:44:18] We have-- we run on the light system like the Supreme Court--

THOMAS A. GRENNAN [02:44:21] I'll make it simple, Senator. I'm sorry.

LATHROP [02:44:23] --just less time.

THOMAS A. GRENNAN [02:44:24] You know me. I'm--

LATHROP [02:44:25] I know you. [LAUGH]

THOMAS A. GRENNAN [02:44:28] All right. It's-- the system is not broken. It doesn't need to be fixed. This is a good state to represent plaintiffs in and there are already built-in things that level the playing field, such as 44-359, the attorney fee statute against insurance companies and the statute that this committee I believe was responsible for that allows an injured party to recover for the full amount of medical bills even if there was a lesser amount that was paid by third parties. I'll entertain any questions.

LATHROP [02:45:01] I don't see any but I appreciate you coming down and--

THOMAS A. GRENNAN [02:45:05] It's my first time down and--

LATHROP [02:45:06] --somebody I've always enjoyed having on the other side.

THOMAS A. GRENNAN [02:45:09] Thank you, Senator.

LATHROP [02:45:10] Yeah. Thanks, Tom. Next opponent.

EMILY BOTTORF [02:45:21] Good afternoon again, Senator Lathrop and members of the Judiciary Committee. My name is Emily Bottorf, E-m-i-l-y B-o-t-t-o-r-f. I'm an attorney at Baylor Evnen law firm. I'm here in opposition to LB491 on behalf of the Nebraska Chamber of Commerce, the National Federation of Independent Businesses of Nebraska, and I'm also here on behalf of and as a board member of the Nebraska Defense Counsel Association. I'll obviously combine my testimony in an effort to be mindful of this committee's time. I'm not a paid lobbyist for any of those organizations. In terms of the current status of Nebraska law, the Nebraska Supreme Court has stated, as recently as 2017, in no uncertain terms that punitive damages contravene the Nebraska Constitution. And I realize some of the previous proponents said that there hasn't been any real reason for it and it's not clear under Nebraska law that that's actually true. But I think it's actually very well settled under Nebraska law that the measure of recovery in all civil cases is compensation for the injury sustained. And that's been something that's been stated over and over and over again which goes against punitive damages. Even when the court has analyzed other laws which attempt to add a specific penalty, the court has always come back to that principle. Senator Wayne did reference the Workers' Compensation Act, but this bill does not codify a specific penalty for certain behavior. The Supreme Court has upheld the 50 percent penalty for workers' compensation loss for delinquent payment; however, this bill gives the trier of fact unlimited discretion, which I believe directly contravenes our case law. I realize this bill attempts to define language within the Nebraska Constitution but I believe a constitutional amendment is required to allow for punitive damages. The specific language of this bill that concerns me is that it's vague and undefined in terms of standards under which these damages would be decided. Most

states that have punitive damages, it's required to be proven by clear and convincing evidence. This law does not comment on the requisite burden of proof. Several states require bifurcation for the purposes of determining compensatory damages and punitive damages because the evidentiary burdens are so different. Again, this law doesn't comment on that. And one of the justifications listed in this bill is deterrence. Again, generally, there are additional evidentiary requirements. Was this an isolated incident? Is there actual evidence that this conduct continues and will likely continue into the future, thus requiring deterrence? And finally, if we're simply using this to potentially provide property tax relief, which again I question whether it would have that desired effect, I think it could have a lot of negative economic consequences. Some Nebraska bank-- businesses would be in bankruptcy and I think there's better ways to maybe regulate their behavior or curtail any, you know, behavior that we see that-- that is unsavory. I also think there's a major concern of jury bias. If a jury is sitting there and they know their school district could benefit from this, the jury is not thinking about maybe this particular plaintiff. So I think that's an issue. I think, to Senator DeBoer's point, I do think there's a possibility that plaintiff's counsel could say they created a fund that the school district benefits from and that they should be entitled to a percentage of-- of that fund. And so I think that that's a real concern as well. So in sum, I just want to say, to the extent the committee disagrees with me on the notion that this is acceptable or allowable under Nebraska law, I think that this is way too broad at this point and there's nothing that really kind of reins in when these are allowed. And I fear that we would have negative-- a lot of negative impact on businesses in Nebraska when there's a better way to regulate that behavior.

LATHROP [02:48:55] OK.

EMILY BOTTORF [02:48:56] Any questions?

LATHROP [02:48:56] I see none, but thanks for your testimony.

EMILY BOTTORF [02:48:58] Thank you.

LATHROP [02:49:07] Good afternoon.

ROBERT M. BELL [02:49:09] Hello, Chairman Lathrop and members of the Judiciary Committee. My name is Robert M. Bell; last name is spelled B-e-l-l. I'm the executive director and registered lobbyist for the Nebraska Insurance Federation. I'm here today in opposition to the passage of LB491. I've also been asked by the Nebraska Insurance Information Services to register their opposition. The Nebraska Insurance Federation is the primary trade association of insurers domiciled in or with a significant economic presence in Nebraska. Currently the federation consists of 26 member companies and seven associate members representing a spectrum of insurers from small insurers to Fortune 500 companies. Members write all lines of insurance. One of the goals of the

federation is to promote concepts and importance of insurance products to policymakers and the public. Nebraska insurers provide high-value, quality insurance products to Nebraskans that help protect Nebraskans during difficult times. Additionally, members of the Nebraska Insurance Federation provide nearly 15,000 jobs to the Nebraska economy. The insurance industry is opposed to any proposed statutory expansion of damages that go beyond making an insured or claimant whole. Higher settlements or judgments against insureds or insurers that go beyond making insured or claimant whole lead to higher premiums which could result in less Nebraskans-- or result in Nebraskans and businesses having less coverage. Additionally, insurance companies are already subject to punitive action by the Department of Insurance. The insurance code provides both the Unfair Insurance Trade Practices Act and the Unfair Insurance Claims Settlement Act that subject insurers to fines and/or suspensions or revocation of their licenses. Those fines do go to the school fund, it's my understanding. For these reasons, the Nebraska insurance Federation opposes LB491. Thank you for the opportunity to testify.

LATHROP [02:51:09] I see no questions for you, Mr. Bell, but thanks for being here.

ROBERT M. BELL [02:51:12] You're welcome.

LATHROP [02:51:14] Any other opponents to LB491? Anyone here in a neutral capacity? Seeing none, Senator Wayne, you may close. We do have two letters of support, one from Colby Coash with the Nebraska Association of School Boards--

_____ [02:51:34] Property tax relief. [LAUGHTER]

LATHROP [02:51:44] Jenni-- [LAUGH] NSEA is also in support. Senator Wayne to close. Apparently the property tax relief is catching on, the appeal, the allure of property tax relief.

WAYNE [02:52:02] Well, and this-- this-- it's going to-- it's going to the schools for the kids, which-- which brings me up two things that I was thinking about, Rainmaker movie that Mr. Lindsay-- there was a quote in there. A judge said, are you in over your head? And the lawyer answered, absolutely. It's kind of how I feel. But there's another quote in that movie that reminds me. It says, I'm alone, outgunned, scared, and inexperienced, but I'm right. And that's how I feel because this body passed in 1998 a Nebraska Wage Payment Collection Act, 1232. This actually went-- or Section 48-1231. And the amount that is recovered is distributed to the common school fund. This actually went to the Nebraska Supreme Court and they didn't rule it unconstitutional. Long as it goes to the school fund, it's fine. We have set a precedent of clarifying these types of damages are prohibited-- are within the realm of our constitution. As it relates to the wide-openness of punitive damages, there's 40 other states, more than 40 states-- there's 45 states that have them. There's plenty of case law and even the United States Supreme Court has ruled multiple times when punitive damages get out of line, when they're too big, when

they're too small, they don't fit the facts. There's plenty of case law to rein in punitive damages. And, no, it's not in the statute because it would be a super-long statute because each individual case is different; the facts are different. And to hear people say, well, it's wide open and you can plead it and you can plead anything and all you've got to do is meet these certain elements, that's what every case is what you do when you plead. You plead the elements, you get into court, and then a jury or a fact finder says, I think you met your burden and here's what happens, here's the damages you get. And they could-- they could say, and rightfully so probably in Nebraska more so than-- than any other state, because we do have conservative juries that I've seen, they'll say, yes, here goes all your compensatory damages, but we think he acted outrageous, but we're going to give you \$1 in punitive damage. I've seen those cases in other states. That is the purpose of a jury. You plead the case, you argue the case in front of the jury, and then they decide what they think is appropriate based off of the facts and everything heard around them. That's in every case that goes before a jury. This is no different. So all this is trying to do is to clarify and clean and tell the Supreme Court and tell attorneys this is constitutional in Nebraska and if you do it, it has to go to the common school fund. Our schools are hurting. Let's open up the door; let's figure out how we can make this better to make sure we can fund our local schools. And this is just one way. And then the last thing I'll say is, the argument of it hurts businesses, the rest of the country seems to be doing OK. I have not seen a whole bunch of people flock to Nebraska to start and run businesses because we don't have punitive damages. But I still keep reading a lot of companies leaving Nebraska and going to states that have punitive damages, so that's not a valid argument either. It's not valid. All I'm trying to do is remove a barrier to increase funding to schools and give people, jurors the opportunity to say this outrageous, egregious behavior should be penalized with a fine. And that's what punitive damages are. And with that, I'll answer any questions.

LATHROP [02:55:49] Senator Brandt.

BRANDT [02:55:51] Thank you, Senator Wayne. We're going to hear 143 bills in this committee and this is probably the only shot at property taxes we're going to hear in Judiciary. Thank you for that. One hundred and forty-three bills probably isn't quite as many as you've introduced this session, but it's going to be pretty close. [LAUGHTER] And this bill has impressed me so much, can I cosign this--

WAYNE [02:56:12] Yes, you can.

BRANDT [02:56:13] --cosponsor?

WAYNE [02:56:13] Yes, you can.

BRANDT [02:56:13] Would you let me cosponsor?

WAYNE [02:56:13] I will let you.

BRANDT [02:56:15] And thank you for starting the discussion on this. This really intrigues me.

LATHROP [02:56:20] And I thought he was going to be bored today because we're dealing with civil procedure. I think for those of you that aren't frequent fliers here, we're about three days from our last hearing and this has been a long session. The committee was a little giggly today, maybe a little squirrely, but not that we don't take any one of these bills very seriously. So, Senator Wayne, thanks for introducing--

WAYNE [02:56:43] Thank you.

LATHROP [02:56:43] --LB491 and thank you all for your participation. That will close our hearings today.